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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-1228

WARNIE LEE IVY ET AL., PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

Petitioner,

VS.

SECURITY BARGE LINES, INC., DEFENDANT-APPELLANT, CROSS-APPELLEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners, Warnie Lee Ivy and Jewel Ivy, plaintiffs below, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing the decision of the trial court, the United States District Court for the Northern Dis-

trict of Mississippi, Greenville Division, which had entered a judgment on a jury verdict for petitioners. The Court of Appeals' decision should be reversed due to its refusal to allow recovery of damages for loss of society for the death of a seaman within the territorial waters of the United States, and the action should be remanded for further proceedings to the District Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, sitting en banc, reported at 606 F.2d 524, appears as Appendix A to this petition. The original panels' decision in this case reported at 585 F.2d 732, appears as Appendix B to this petition. The opinion of the United States District Court for the Northern District of Mississippi, Greenville Division, as reported at 424 F.Supp. 1154, appears as Appendix C to this petition. The jury verdict on

special interrogatories in this case appears as Appendix D to this petition. The final jusgment of the United States District Court for the Northern District of Mississippi, Greenville Division, appears as Appendix E to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 13, 1979. This petition for certiorari was filed within 90 days of this date. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether or not this Court's decision in Mobil Oil Corp. v. Higginbotham approved the doctrine announced in Michigan Central R.R. v. Vreeland which limited damages recoverable under the F.E.L.A. statute to pecuniary loss as applicable to actions for wrongful death of seamen within the territorial waters

of the United States.

2. Whether or not Michigan Central R.R. v. Vreeland should still be considered as binding precedent in a Jones Act wrongful death action.

3. Whether or not a finding of unseaworthiness is required to maintain an action under Moragne v. State Marines Lines, Inc. and Sea-Land Services, Inc. v. Gaudet.

STATEMENT OF THE CASE

On August 11, 1975, John Ivy was employed by the respondent, Security Barge Lines, Inc., as a member of the crew of the vessel, M/V ISSAQUENA, in the capacity of a deckhand. At approximately 9:15 P.M., on that night, Ivy was engaged in the task of installing a fathometer on a barge located on the bow of the vessel's tow. Ivy was performing this task with the first mate, Bobbie Davis and another crew member, Charles Glasco. The vessel and its tow were headed upriver on

the Mississippi near mile 245 a few miles from Baton Rouge, Louisiana. Charles Glasco's experience working on the river was limited to the fifteen days of this voyage immediately preceding this incident. Glasco had no training prior to this incident, and he was not familiar with any of the safety rules of the company. Also, he was not familiar with any deckhand manual containing the safety rules and regulations of the vessel owner or with certain safety bulletins posted on board the vessel. Glasco was not aware that the lead barge on the port side where the fathometer was being installed was five feet longer than the barge to its starboard.

It was approximately 1200 feet from the location where the fathometer was being installed on the vessel's tow to the vessel itself. The only lighting available to the crew members were ordinary flashlights. Mate Davis was carrying a walkie-talkie to be used to communicate with the pilot of the

vessel, Captain Smith.

While installing the fathometer on the lead barge on the port side, Glasco stepped into the vacant space on the starboard side of the lead barge and fell into the river. When Glasco went overboard, Ivy proceeded down the tow of the vessel waving his flashlight in order to communicate to Captain Smith the fact that a man was overboard. The vessel owner had established rules concerning rescue operations. These rules were that the engines should be stopped and life saving operations should begin immediately when a man went overboard. Captain Smith did not follow these rules, but rather he began backing the vessel and its tow when learning Glasco was overboard.

Glasco surfaced on the port side of the tow approximately two barges from the stern of the tow, and he began screaming for help. Ivy, who had been proceeding toward the vessel down one of the middle pathways between the

barges of the tow, heard Glasco's shouts. Whereupon Ivy, realizing Glasco was in great peril, proceeded to the outside of the barge where Glasco was in the water. There he was able to communicate with Glasco, who told Ivy that he had removed his life jacket in order to get from under the barges. At this time, by communicating with his flashlight, Ivy answered twice to Captain Smith's question in the affirmative that he had spotted Glasco.

Captain Smith, despite having knowledge that Glasco had surfaced, continued backing the vessel and its tow. At this point, the whell wash created by the 5000 horsepower engines with ten foot props inside of court nossels at 790 R.P.M. in full reverse was great. Any attempt by Ivy to throw the life jacket to Glasco would have been useless because of the backwash. Ivy told Glasco he was going to get him a line, and Ivy proceeded down the outside of the barges to the vessel. Captain Smith saw Ivy fall off the

stern of the vessel's tow, but he still continued backing for approximately five more minutes. The next measure taken by Captain Smith was to come ahead and cross to the opposite bank before beginning life-saving operations. It was approximately fifteen minutes form the time Ivy went overboard until Captain Smith stopped the ISSAQUENA's engines and began life saving-operations.

At the time Ivy went overboard, all the lights on the M/V ISSAQUENA were in use. This included two high intensity search lights mounted above the pilot house which rotated on a 360° axis. At no time during this incident was there any communication between Captain Smith and Mate Davis by use of the walkie-talkies.

As a result of this incident, John Ivy was lost. After a search by the Coast Guard and East Baton Rouge Sheriff's Department, his body was never recovered. Glasco managed to swin to a bank where he was picked up and

returned to the M/V ISSAQUENA.

This action was brought by petitioners, for the wrongful death of their son, John Ivy, pursuant to the Jones Act, 46 U.S.C. section 688 and General Maritime Law for unseawothiness, in the Middle District of Louisiana. The action was transferred to the Northern District of Mississippi, Greenville Division, on motion of the respondents, Security Barge Lines, Inc.

At trial, in answer to special interrogatories, the jury awarded John Ivy's parents $50,000.00 each for loss of support, services and society. These awards were reduced by 50% to reflect the contributory negligence of the decedent. The jury award was based solely on negligence. There was no finding of unseaworthiness. (Appendix D) Both parties appealed.

On December 4, 1978, a panel of the United States Court of Appeals for the Fifth Circuit, consisting of Circuit Judges

Coleman, Clark and Rubin, reversed the judgment and remanded for a new trial. The judgment was reversed for the following reasons:

1. Nonpecuniary damages could not be recovered under the Jones Act.
2. Plaintiffs had no procedural capacity.
3. Failure of the trial judge to instruct the jury on discount to present value.
4. Insufficiency of the evidence to support loss of services and support.
5. Some confusion as to an instruction on negligence.
6. Closing argument by counsel for petitioners contained a reference to the golden rule argument.

A petition for rehearing en banc was filed timely by petitioners. An en banc rehearing was granted and held solely on the issue of whether or not loss of society could be recovered by the survivors of a seaman for a

death occurring within the territorial waters of the United States when the action was based solely on negligence. On November 13, 1979, in a decision written by Circuit Judge Alvin B. Rubin, a majority of the en banc Fifth Circuit affirmed the decision of the original panel. Chief Judge John R. Brown, joined by Circuit Judge Kravitch, filed a dissenting opinion. The basis of the majority opinion by the en banc Fifth Circuit was two-fold. First, it relied on The Osceola, 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, to maintain the proposition that a general maritime cause of action based on Moragne-Gaudet remedy required an unseawothiness finding. This was despite the express holding of Lindgren v. U.S., 1929, 281 U.S. 38, at 48, 50 S.Ct. 207, 211, 74 L.Ed. 686, 693, that The Osceola remedy did not apply to actions for wrongful death. The majority of the en banc Court failed to realize that the general maritime action for wrongful

death arose under Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339, and it was expressly created with the intent of being beyond the preclusive effect of the Jones Act. (90 S.Ct. 1785, n.12)

The second aspect of the opinion relied upon a mistaken view that Mobil Oil v. Higginbotham, 1978, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581, silently approved of the rule of Michigan Central R.R. v. Vreeland, 1913, 227 U.S. 59, 33 S.Ct. 192, 59 L.Ed.2d 417 limiting damages to pecuniary loss under the F.E.L.A. as being applicable to actions for the wrongful death of a seaman.

Petitioners submit that the majority of the en banc Court erred in requiring an unseaworthiness finding for the maintenance of a general maritime action for the wrongful death of a seaman. Also, it is submitted that the Court below erred in reading

Higginbotham as an approval of the continued application of the Vreeland rule to actions brought by the survivors of seamen. Further, petitioners maintain that the Vreeland rule can no longer be accepted as valid precedent in cases concerning the death of seamen.

Due to the national importance of the issue of whether or not the survivors of seamen can recover damages for loss of society for a death occurring within the territorial waters of the United States, this case presents a question of sufficient seriousness in the field of admiralty to warrant and require a review by this Court.

REASONS FOR GRANTING THE WRIT

I.

THE HIGGINBOTHAM DECISION DOES NOT APPROVE THE PECUNIARY LOSS RULE OF THE VREELAND CASE.

In reaching its decision that loss of society was not recoverable by the survivors of a seaman in an action for wrongful death

arising within the territorial waters of the United States, both the original panel and the majority of the en banc of the Fifth Circuit concluded that this Court approved the pecuniary loss rule of the Vreeland[1] case in Mobil Oil Corp. v. Higginbotham, 1978, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581. (Ivy v. Security Barge Lines, Inc., 5 Cir. 1978, 585 F.2d 732, 738; Ivy v. Security Barge Lines, Inc., 5 Cir. en banc 1979, 606 F.2d 524, 528). This conclusion was based on this Court's silence regarding the Jones Act status of two claimants in Higginbotham, 5 Cir. en banc 1977, 545 F.2d 422, 433. All claimants were restricted to pecuniary loss under the provisions of DOHSA, 46 U.S.C. 761, regardless of their status or the basis upon which the cause of action

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1. Michigan Central R.R. v. Vreeland, 1913, 227 U.S. 59, 33 S.Ct. 192, 59 L.Ed.2d 417.

arose. Higginbotham, supra. The Court of Appeals concluded that the silence as to Jones Act status should be construed as an approval of the Vreeland rule fundamentally misreading the theoretical basis underlying the Higginbotham decision.

No language in the Higginbotham decision supports the conclusion of the Court of Appeals, nor is there language from which such a conclusion can be inferred. The Higginbotham case presented a question of statutory construction, and it was decided solely on that basis:

> "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements." (98 S.Ct. at 2015)

The statutory limitation on damages contained in DOHSA is, where geographically applicable, binding on the courts regardless of the status of the claimants or the basis for the cause of action. Higginbotham's silence regarding issues of status is

reflective of the predominance of DOHSA's explicit language on damages. The issue of damages under the Jones Act was not addressed in Higginbotham, because, within the statutorial and judicial scheme of remedies for maritime wrongful death, Congress had foreclosed the issue where DOHSA was geographically applicable.

> "The Act (DOHSA) does not address every issue of wrongful death, see e.g., n.15, supra., but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless. (98 S.Ct. at 2015)

This Court approached the questions presented in Higginbotham not on the basis of situs because of the geographical nature of DOHSA. The explicit language of DOHSA had a preclusive effect on the claims of all the parties regardless of status, because DOHSA was a clear expression of congressional intent in a remedial field that constitutes a scheme combining both statutorially and

judicially created remedies. This is because Congress has never adopted "a comprehensive maritime code", (Higginbotham, 98 S.Ct. at 2015); thus, the admiralty courts have been left the traditional task of fashioning maritime law in areas where Congress has not addressed itself. (Edmonds v. Compagnie Generale Transatl., ____U.S. _____, June 27, 1979, Blackmun, Jr. dissenting _____, slip op. p. 6.)

Higginbotham reflects this Court's refusal to ignore a clear mandate of Congress even though its traditional rule making power has been great where Congress has left voids. Higginbotham relied on the explicit language of DOHSA regardless of status. This creates some overlap between DOHSA and the Jones Act due to the silence of the Jones Act on the issue. In this manner, Higginbotham answers the question reserved in Lindgren v. U.S., 1929, 281, U.S. 38, at 48, 50 S.Ct. 207, 212, 74 L.Ed. 686, 694, the

relationship of DOHSA to the Jones Act. Higginbotham does not mean that DOHSA pre-empts the Jones Act on the High Seas. The two statutes create separate remedies, but, under Higginbotham, DOHSA's rule on damages restricts the recovery under the Jones Act. Where DOHSA is silent or where the statutes conflict, the two statutes must be given separate effect. This is true in regard to jury trial and survival. The Jones Act provision as to Jury trial conflicts with DOHSA, but there is no reason why this provision should not be given effect. Nor should the survival provision of the Jones Act, a subject upon which DOHSA is silent,[2] be affected by DOHSA. DOHSA controls

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2. Within such a scheme of remedies, DOHSA's silence on survival can be supplemented by a general maritime cause of action where the Jones Act is not applicable, because there is no congressional mandate against such a remedy. (Barbe v. Drummond, 1 Cir. 1974, 507 F.2d 794, cited favorable in Higginbotham, 98 S.Ct. at 2015.)

only the single issue of damages for wrongful death on the high seas. On this issue there is an overlap by the more specific statute, DOHSA.

It is submitted that the Vreeland rule on damages was not explicitly or inferentially approved in Higginbotham. Higginbotham decided the issue of damages as to all claimants regardless of status or basis of remedy on the same controlling principle, the congressional mandate clearly expressed in DOHSA. The Vreeland rule must be examined in it own right not with the aid from Higginbotham.

II.

THE VREELAND RULE CANNOT WITHSTAND ANALYSIS UNDER THE STANDARDS SET OUT IN MORAGNE.

In 1913, the Vreeland Court held that recovery under the F.E.L.A., 45 U.S.C. 51, for wrongful death was limited to pecuniary loss. This decision has been consistently applied by the Courts of Appeal to cases

arising under the Jones Act, 46 U.S.C. 688. (In re: M/V ELAINE JONES, 5 Cir. 1973, 480 F.2d 11, reh. granted, 1973, 513 F.2d 911, cert. denied, 1975, 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60; Cities Service Oil Co. v. Launey, 5 Cir. 1968, 403 F.2d 537; Igneri v. Cie de Transports Oceaniques, 2 Cir. 1963, 323 F.2d 527, cert. denied, 1964, 376 U.S. 949, 84 S.Ct. 965, 11 L.Ed.2d 969; United States v. Boykin, 5 Cir. 1931, 49 F.2d 762.)

In Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 90 S.Ct. 1972, 26 L.Ed.2d 339, a unanimous Court overruled The Harrisburg, 1886, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358, which had held that there was no general maritime cause of action for wrongful death. Speaking through Justice Harlan, the opinion recites the various factors which should be considered in overruling prior decisions:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions.

> Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in very case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors. (Moragne, 90 S.Ct. at 1772)

Justice Harlan's analysis is a proper starting point for a consideration of the continued validity of the Vreeland rule. To begin such analysis the effect of the Vreeland rule within the territorial waters of the United States should be considered. This effect is that if the negligence of a vessel owner operates to kill his own Jones Act seaman and an independant contractor's longshoreman, different measures of recovery would result if the incident occurred within territorial waters. Recovery under the Jones Act would be limited by Vreeland, and

the longshoreman's recovery would be controlled by Sea-Land Services, Inc. v. Gaudet, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, including loss of society. Also, this would be true of the survivors of any visitor or passenger recovering under Kermarec v. Compagnie General Transatlantique, 1959, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550. This anomaly brings on even more serious problems in a situation where a joint tort-feasor is liable with a vessel owner to the survivors of Jones Act seamen. Contribution under United States v. Reliable Transfer Co., Inc., 1975, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251, would be avoided, because the survivors of a seaman would not be limited by Vreeland in their recovery against the joint tort-feasor who was not a Jones Act employer. Presumably, Edmonds v. Compagnie Generale Transatlantique, supra., would apply to allow the survivors a full recovery against the non-employer defendant. Whether or not

such a defendant could seek indemnity on the basis of proportionate fault against the J'nes Act employer is a serious question. Consideration of these issues is demanded by this case, when it is realized that such factual situations occur more often within the territorial waters where the maritime industry requires regular contact between the various kinds of activity and endeavors in ports and rivers than on the high seas. The decision of the Court of Appeals ignores these problems,[3] and, if it is allowed to stand, it will result in endless litigation to resolve these issues.

The consequences of a continuation of the Vreeland rule, contrasted to its origin, raises serious doubt of its present usefulness. The Vreeland rule was decided within

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3. In the original opinion, the panel noted these problems, 585 F.2d at 738-739, n.8, but, the majority of the en banc Court did not address these issues.

the jurisprudential back drop of The Harrisburg, supra. The relationship of the two cases is clear from the following language from Vreeland.

> "In Baker v. Bolton, 1 Campb. 493, Lord Ellenborough ruled that 'in a civil court, the death of a human being could not be complained of as an injury.' Mobile L. Ins. Co. v. Brame, 95 U.S. 756, 24 L.ed. 580; The Harrisburg, 119 U.S. 199, 204, 30 L.ed. 358, 359, 7 Sup. Ct. Rep. 140.
>
> The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds - 'or in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death,' etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous.
>
> This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one

> beyond that which the decedent had, one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only." (Vreeland, 33 S.Ct. at 195)

Since The Harrisburg was overruled by Moragne, the present validity of this analysis in Vreeland is doubtful. Vreeland, like The Harrisburg, was an adoption of the English rule.

> "The word 'pecuniary' did not appear in Lord Campbell's Act, nor does it appear in our act of 1908. (The F.E.L.A.) But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss." (Vreeland, 33 S.Ct. 196)

As with The Harrisburg, the following statement by Justice Harlan in Moragne bears with equal force to Vreeland.

> "The most likely reason the English Rule (The Harrisburg) was adopted in this country without much question is simply that it had the blessing of the age." (Moragne, 90 S.Ct. 1780)

Considering its origin and the anomaly

it creates, which Justice Harlan considered strange, (Moragne, 90 S.Ct. 1785), the inhibition of the recovery of the survivors of Jones Act seamen, when seamen are the traditional wards of the admiralty courts, Garrett v. Moore-McCormack Co., Inc., 1942, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239, the Vreeland case cannot be said to have the "blessing of the age".[4]

The criteria Moragne established for overruling prior decisions are met when the result of the Vreeland rule are considered: 1) A continuation of the Vreeland rule will promote rather than eliminate litigation of issues in Jones Act cases; 2) Different measures of recovery for different claimants does not provide a clear standard for conduct of affairs, the shipowner should not realistically expect that one consequence will flow from the death of a Jones Act

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4. Gaudet, 94 S.Ct. 816, n.21, stating that 27 of 44 state and territorial wrongful death statutes allow recovery for loss of society.

seaman and another from a longshoreman;

3) The different measures of recovery based on technical rules of status without a rational basis for discrimination does not comport itself with public faith in reasoned and impersonal judgments. As stated by Dean Pound:

> "Again stare decisis has no legitimate application to doctrines of the law of torts built upon a mistaken foundation persisting in books after that foundation has been undermined, which are out of accord with general principles recognized today. So that if they are rejected the general law is clarified rather than unsettled . . . Anomalies of this sort ought not to be protected by stare decisis. (Pound, R., 13 NACCA L.J. 19, 23 'Some Thoughts on Stare Decisis'." 1954.)

The majority of the en banc Court's answer that relief should be sought from Congress, 606 F.2d 529, n.13, is not an adequate answer to the questions presented by this case:

> "This Court, in other appropriate contexts has not hesitated to overrule an earlier decision and settle a matter of continuing concern, even though relief might have been obtained by legislation." 95 S.Ct. at 1715, n.15.

For these reasons, it is submitted that the Vreeland rule on damages should be overruled, so as to bring the remedies of the survivors of seamen into line with the survivors of other classes of decedents within the territorial waters of the United States. This is harmonious with Higginbotham's (98 S.Ct. at 2015) recognition that there will be two measures of recovery for wrongful death, one mandated by Congress on the high seas, and the other developed by the Courts. Such a rule should apply to all claims regardless of the status.

III.

THE COURT OF APPEALS INCORRECTLY REQUIRE AN UNSEAWORTHINESS FINDING TO SUSTAIN A CLAIM UNDER GENERAL MARITIME LAW

The decision of the majority of the en banc Court of Appeals relies on The Osceola, 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, in enunciating a rule which necessitates the finding of an unseaworthy condition or direct vessel owner negligence to sustain an

action under the general maritime law for wrongful death. This reliance is misplaced. In Lindgren v. U.S., 1929, 281 U.S. 38, 47, 50 S.Ct. 207, 211, this Court held that the general maritime law did not provide an action for wrongful death on the basis of unseaworthiness.

> "The statement in The Osceola, supra., 175 of 189 U.S., 23 S.Ct. 483, on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for this death." (Lindgren v. U.S., 1929, 50 S.Ct. 211)

The distinctions made in The Osceola regarding negligence of co-employees and unseaworthiness are not applicable to actions for wrongful death. Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 90 S.Ct. 1772, 27 L.Ed.2d 339, created the action for wrongful death under general maritime law. Moragne specifically held that this judicially created remedy was available to seamen and

beyond the preclusive effect of the Jones Act.

> "Likewise, the remedy under general maritime law that will be made available by our overruling today of The Harrisburg, seems to be beyond the preclusive effect of the Jones Act as interpreted in Gillespie. The existence of a maritime remedy for deaths of seamen in territorial waters will further, rather than hinder, 'uniformity in the exercise of admiralty jurisdiction'; and, of course, no question of preclusion of a federal remedy was before the Court in Gillespie or its predecessor, Lindgren v. United States, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686 (1930), since no such remedy was thought to exist at the time those cases were decided. See Gilmore & Black, supra., at 304; cf. Kernan v. American Dredging Co., 355 U.S., at 429-430, 78 S. Ct., at 397." (90 S.Ct. 1785, n.12)

Since The Osceola, supra., does not establish a requirement of an unseaworthiness finding to maintain an action for wrongful death under the general maritime law, the purposes of Moragne must be considered before such a requirement is established. In holding "that an action does lie under general maritime law for death caused by

violation of maritime duties" (90 S.Ct. 1792) this Court meant to bring uniformity to this area of admiralty law. To require a seaman's survivor to prove unseaworthiness, when every other class of maritime claimant has no other basis for recovery other than negligence, (cf. 33 U.S.C. 905[b]) would result in a true lack of uniformity. Such a holding cannot be reconciled with Moragne. The decedent's in Gaudet and Moragne were both longshoremen, and, if a Moragne action cannot be maintained on the basis of negligence, then the 1972 amendments to the Longshoremen and Harborworkers Act, 33 U.S.C. 901, et seq., must be read as a legislative overruling of Moragne, since unseaworthiness was eliminated as a basis for longshoremen recovery. There is nothing in the legislative history of the 1972 amendments to suggest that this was the intent of the amendments.

While petitioners in this case did not allege an action for negligence under the

general maritime law in the district court, the Court of Appeals thoroughly considered this issue in its en banc decision,[5] and the decision relied primarily on The Osceola[6] in requiring the unseaworthiness finding. As previously stated, this was error. But, further, the doubt which the dissent in Gaudet had for enlargement of the traditional damages available on the basis of unseaworthiness is not present here. The dissent in Gaudet was primarily concerned with the nature of the absolute liability which flowed from an unseaworthiness remedy. The dissent in Gaudet urged that a remedy based on absolute liability should have limits which prevent the possibility of punishment entering into the award. (Gaudet, 94 S.Ct.

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5. See. Moragne, 90 S.Ct. at 1776-1777, n. 1.

6. The Osceola, supra., was based on the fellow-servant rule which has been rejected as even a basis for dimunition of damages recently by this Court. Edmonds, supra.

at 827-828, Powell, J., dissenting.) Since petitioners are relying on negligence in this action, the same policy considerations which concerned the dissenters in Gaudet are not present.

By allowing a recovery under general maritime law based on negligence, this Court would recognize that the tie the Jones Act has to the F.E.L.A. is not absolute. Jones Act cases have never been absolutely tied to the F.E.L.A. This has been recognized by this Court in the rescue doctrine in seaman's cases. (Cortes v. Baltimore Insular Lines, Inc., 1932, 287 U.S. 367, 53 S.Ct. 173, 77 L.Ed. 368; Also, see Brown, Chief Judge dissenting, Ivy, 606 F.2d 531, n.3,4, 5 & 6) The F.E.L.A. does not contain any clear congressional mandate to justify a refusal to supplement the Jones Act recovery with a general maritime action based on negligence.[7]

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7. It is submitted that since the only body of federal law concerning the direct employment of a seaman is found in the Jones Act cases, in this action the general maritime action for negligence should be co-extensive with the Jones Act case law. This would prevent the need for the courts to develop a body of different substantive rules to cover identical fact situations, and it would recognize that longshoremen and passengers rarely face the same hazzards as seamen.

The majority of the en banc Court of Appeals, in refusing to allow an action based on negligence for wrongful death, departed from the dictates of Moragne. This is shown by the following passage from the majority opinion:

> "These statutes were often unwieldy and not designed to accommodate maritime claims; moreover, because they varied from state to state, the representatives of similarly situated deceased seamen might be awarded widely varying sums based on the fortuity of whether the accident occurred within or without the three-mile limit and, if it were within that limit, based on the laws of the particular state where the casualty occurred. One of Moragne's objectives was to substitute a uniform current for these unpredictable eddies." (Emphasis added. Ivy, 606 F.2d 527)

This statement clearly belies a misunderstanding of the state of the law prior to Moragne. The survivors of a seaman could not take advantage of these varying state remedies, nor any federal remedy for unseaworthiness. The Jones Act had a preclusive effect as to a state remedy and a federal remedy was not thought to exist. (Gillespie v. United States Steel Corp., 1964, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199; Lindgren v. U.S., supra.) This was the strangest anomaly which Moragne was meant to correct. Now, if the Court of Appeals decision is allowed to stand, a stranger anomaly will be created. The Moragne-Gaudet remedy will, if an unseaworthiness finding is required, be only available to the survivors of seamen. This is not unfair to the survivors of seamen where unseaworthiness can be proved, but it is a tragic full circle from Moragne. The only way to provent Moragne from becoming an anomaly itself is to recognize that a

Moragne action can be maintained on the basis of negligence, and that such an action is available to both the survivors of seamen and non-seamen within the territorial waters of the United States.

CONCLUSION

This case presents issue of exceptional national importance to the various maritime interests. A review of the decision of the en banc Court of Appeals is required due to the results its decision dictates. There is no rational basis to distinguish between the survivors of seamen and non-seamen in actions arising within the territorial waters of the United States. Such a distinction is contrary to the dictates of an unanimous Court in Moragne, and it is not supported by any express mandate by Congress. The only basis for such a distinction would be the Vreeland decision, and Vreeland does

not stand as a bar to a recovery of Gaudet damages under the general maritime law within the territorial waters of the United States.

For these reasons, a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit.

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February, 1980

I, MARVIN L. JEFFERS, one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of February, 1980, I served three copies of the petition for a writ of certiorari on respendents by mailing the same, through the United States mail, to counsel of record for Security Barge Lines, Inc., Philip Mansour, Post Office Box 1406, Greenville, MS 38701, and to Amicus Curiae below, Louisiana Trial Lawyers Association, through Harvey J. Lewis, 601 Spain St., Baton Rouge, LA 70802, first class, postage pre-paid.
I further certify that all parties required to be served have been served.

February 8, 1980.

MARVIN L. JEFFERS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. _____

WARNIE LEE IVY ET AL., PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

VS.

SECURITY BARGE LINES, INC., DEFENDANT-APPELLANT, CROSS-APPELLEE

APPENDIX

APPENDIX "A"

WARNIE LEE IVY ET AL., PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

VS.

SECURITY BARGE LINES, INC., DEFENDANT-APPELLANT, CROSS-APPELLEE

Number 76-4130

United States Court of Appeals
Fifth Circuit

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

ALVIN B. RUBIN, Circuit Judge:

We gathered en banc to consider whether

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*Judges Fay, Frank M. Johnson, Jr., Garza, Henderson, Reavley, Politz, Hatchett, Anderson, Randall, Tate and Sam D. Johnson did not participate in the consideration of ordecision in this case. The case was taken under submission by the court en banc on June 5, 1979.

damages for loss of society may be recovered by the survivor of a Jones Act seaman who met death in territorial waters of the United States as a result of negligence for which his employer was liable. The settled Jones Act jurisprudence denying recovery for this and other elements of nonpecuniary loss and the absence of any adequate reason to take a different tack compel us to hold to the charted course and deny recovery for this element of damages.

John Ivy, the decedent, was a member of the crew of the vessel M/V ISSAQUENA until he was lost and presumably drowned on the night of August 11, 1975 as he was attempting to aid a fellow crewman who had fallen overboard. The vessel and its tow were then a few miles above Baton Rouge, Louisiana, heading up the Mississippi River.

Decedent's father, Warnie Lee Ivy, instituted this suit under the Jones Act for negligence and the general maritime law for

unseaworthiness. In answer to special interrogatories, the jury found that the vessel was not unseaworthy, and that John Ivy died as a result of the negligence of the defendant but was 50% contributorily negligent himself, and awarded each of his parents $50,000 for loss of support, services, and society. We agreed to hear the case en banc to consider only the issue of whether this award was permissible in the light of the jury's conclusion that recovery was premised solely on the Jones Act.

[1] In The Osceola, 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, the Supreme Court concluded that general maritime law does not create a cause of action on behalf of a seaman for the negligence of his master or fellow crewmen. The Court held that a "seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew" beyond his maintenance and cure, although

under general maritime law he may be entitled to consequential damages for unseaworthiness of the vessel. Id. at 175, 23 S.Ct. at 487, 47 L.Ed. at 764. Responding to the decision, Congress in 1915 enacted the Jones Act, 46 U.S.C.§ 688,[1] extending to seamen the remedies made available to railroad

1. The Jones Act, 46 U.S.C. § 688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

workers under the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. (F.E.L.A.).[2] Congress thereby legislatively overruled The Osceola insofar as it denied to a seaman the right to recover damages from his employer for negligence of his co-workers. The Jones Act thus became, and has remained, the sole basis upon which a seaman or his beneficiaries may sue his employer for negligence.[3]

2. The Federal Employers' Liability Act, 45 U.S.C. § 51, provides in part:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .

3. The Jones Act imposes liability on the owner of the vessel for injuries or death resulting from negligence whether

Neither the Jones Act nor the F.E.L.A. contains any reference to the items of damage that are recoverable in such a suit. However, in Michigan Central Railroad v. Vreeland, 1913, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417, the Supreme Court interpreted the F.E.L.A. to permit recovery only for damages that "flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries."

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of the owner directly, vicariously for the acts of employees who are not seamen, and vicariously for the acts of the master and members of the crew. In this case, the pleadings, pretrial order and interrogatories make it clear that the negligence on which liability was predicated arose in the navigation of the vessel. This case does not, therefore, involve the question and we express no opinion concerning, whether, an action for negligence might be brought against the owner under general maritime law if the fault were not with the master or a crew member, or whether the Jones Act is the sole remedy for an employee whose employer is negligent.

Id. at 70, 33 S.Ct. at 196, 57 L.Ed. at 421. Thus construed, the act permits recovery for loss of services of the deceased and, when the beneficiary is a child, for the loss of the care, counsel, training and education that it might have reasonably received from the parent. As interpreted by the Court, the act excludes injuries "to the affections and sentiments which arise from the death of relatives, and which, though most painful and grevious to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value." Id. at 71, 33 S. Ct. at 196, 57 L.Ed. at 422.

The Court also held that the F.E.L.A. did not embrace survivorship damages, and denied the beneficiaries recovery for the decedent's pain and suffering prior to his

death. Congress anticipated this aspect of Vreeland by adopting in 1910, prior to the Supreme Court decision, an amendment to the F.E.L.A., making the decedent's action survive for the benefit of the beneficiaries who would be entitled to wrongful death damages, Act of April 5, 1910, c. 143, § 2, 36 Stat. 291, now 45 U.S.C. § 59.

In 66 years since the Vreeland decision, its principle that recovery under F.E.L.A. is limited to pecuniary damages has remained a constant roadbed for railway workers suits.[4] The same principle has uniformly

4. See, e.g., Chesapeake & Ohio Ry. v. Kelly, 1916, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117; American R.R. Co. v. Didricksen, 1913, 227 U.S. 145, 33 S.Ct. 224, 57 L.Ed. 456; Stark v. Chicago, North Shore & Milwaukee Ry., 7 Cir. 1953, 203 F.2d 786; Mobile & Ohio R.R. v. Williams, 1930, 221 Ala. 402, 129 So. 60; Atlantic Coast Line R.R. v. Daugherty, 1967, 116 Ga.App. 438, 157 S.E.2d 880; Simmons v. Louisiana Ry. & Nav. Co., 1923, 153 La. 405, 96 So. 12; Torchia v. Burlington Northern, Inc., Mont. 1977, 568 P.2d 558, cert. denied, 1978, 434 U.S. 1035, 98 S.Ct. 770, 54 L.Ed.2d 783.

been adopted with respect to Jones Act actions.[5]

5. See, e.g., In re M/V Elaine Jones, 5 Cir. 1973, 480 F.2d 11, 32 reh. granted, 513 F.2d 911, cert. denied, 1975, 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60; Cities Service Oil Co. v. Launey, 5 Cir. 1968, 403 F.2d 537; Igneri v. Cie de Transports Oceaniques, 2 Cir. 1963, 323 F.2d 257, cert. denied, 1964, 376 U.S. 949, 84 S.Ct. 965, 11 L.Ed.2d 969; Sabine Towing Co. v. Brennan, 5 Cir. 1936, 85 F.2d 478, cert. denied, 299 U.S. 599, 57 S.Ct. 191, 81 L.Ed. 441; United States v. Boykin, 5 Cir. 1931, 49 F.2d 762; Thompson v. Offshore Co., S.D.Tex.1977, 440 F.Supp. 752; Petition of Risdal & Anderson, Inc., D. Mass., 1968, 291 F.Supp. 353; Petition of Southern Steamship Co., D.Del.1955, 135 F.Supp. 358; American Barge Line Co. v. Leatherman's Administratrix, 1947, 306 Ky. 284, 206 S.W.2d 955; Standard Products, Inc. v. Patterson, Miss.1975, 317 So.2d 376.

In addition, we have denied damages for nonpecuniary loss when a seaman is injured and survives by refusing to permit his spouse to recover for loss of consortium. Christofferson v. Halliburton Co., 5 Cir. 534 F.2d 1147.

Nothing in this case, or in the jurisprudence, is sufficient to plot a change in the Jones Act course. The only question that can be raised concerning it comes as a result of a trident of death cases, beginning with Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 90 S.Ct. 1772, 27 L.Ed.2d 339. The Supreme Court there recognized for the first time a cause of action for wrongful death based on general maritime law. Before then death arising from unseaworthiness could be the basis of a suit under the Death on the High Seas Act, 46 U.S.C. 761, which is limited to events occurring outside the territorial waters of the United States; if the accident occurred within territorial waters, the plaintiff was forced to resort to state wrongful death statutes. These statutes were often unweildy and not designed to accommodate maritime claims; moreover, because they varied from state to state, the representatives

of similarly situated deceased seamen might be awarded widely varying sums based on the fortuity of whether the accident occurred within or without the three-mile limit and, if it were within that limit, based on the laws of the particular state where the casualty occurred. One of Moragne's objectives was to substitute a uniform current for these unpredictable eddies. The Court left open the issue of appropriate damages under this new cause of action, noting, "If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state worngful-death acts have been implemented with success for decades." 398 U.S. at 408, 90 S.Ct. at 1792, 26 L.Ed.2d at 361.

In the wake of Moragne, some circuit courts concluded that the uniformity with

which the Supreme Court had been concerned in that case involved uniform bases of liability rather than standard damage recoveries, and held that nonpecuniary damages could be awarded by utilizing state remedies to supplement the new Moragne cause of action. See, e.g., Dennis v. Central Gulf Steamship Corp., 5 Cir. 1972, 453 F.2d 137 cert. denied, 409 U.S. 948, 93 S.Ct. 286, 34 L.Ed.2d 218; Greene v. Vantage Steamship Corp., 4 Cir. 1972, 466 F.2d 159. Others concluded that the policy of uniformity embodied in Moragne required that the statutory and judicially-developed limitation to pecuniary damages of DOHSA and the Jones Act be extended to claims under general maritime law. See, e.g., Simpson v. Knutsen, 9 Cir. 1971, 444 F. 2d 523; In re United States Steel Corp., 6 Cir. 1970, 436 F.2d 1256, cert. denied, 1971, 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed. 2d 153.

The Supreme Court decided that nonpecuniary damages could be recovered by survivors of a longshoreman for death resulting from unseaworthiness in Sealand Services, Inc. v. Gaudet, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9. There the decedent had, while living, recovered for injuries suffered on state waters, but later died as a result of the same event; his widow sued under Moragne. Although the Court refused to allow double recovery, it did hold the widow entitled to compensation for pecuniary damages, including loss of support, and services, as well as funeral expenses. The Court then turned to the nonpecuniary claim for loss of society and, noting that recovery for this intangible deprivation had been available under the majority of state wrongful death statutes prior to the decision in Moragne, it permitted the award. Id. at 587-90, 94 S.Ct. at 816-17, 39 L.Ed.2d at 22-24.

Neither Moragne nor Gaudet involved a Jones Act seaman. Each of them dealt only with an unseaworthiness claim asserted under general maritime law. Neither of them intimates even in dicta a change in the Jones Act rule. Other reasons, somewhat more complex, appear to preclude interpreting the Jones Act as being supplemented by Moragne-engendered negligence action for damages if (but only if) death occurs in territorial waters or on land. Moragne did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness. The suggestion that the Jones Act measure of damages can be supplemented by the Moragne-cause-of-action-Gaudet-damages rule will not bear analysis;[6] that hybrid could be spawned in

6. See generally Maraist, Maritime Wrongful Death - Higginbotham Reverses Trend and Creates New Questions, 39 La. L.Rev. 81 (1978); Swaim, Requiem For Moragne: The New Uniformity, 25 Loy. L.Rev. 1 (1979). Compare Note, 53 Tul. L.Rev. 254, 263 (1978).

but one context, the coupling of unseaworthiness (capable of producing Gaudet) with a Jones Act claim to give birth to Jones Act damages for negligence. To consider the Moragne-Gaudet result a supplemental remedy to the Jones Act when the suit is for negligence only is not to supplement the statute but to alter the interpretation it has continuously received.

We turn then to the most recent signal from the Supreme Court, its decision in Mobil Oil Corp. v. Higginbotham, 1978, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581. There suit was brought by several claimants seeking recovery for the deaths of their husbands in a helicopter crash outside United States waters. One of the passengers, Shinn, was found by the district court to be a Jones Act seaman and his widow was allowed to sue under the Jones Act, DOHSA, and general maritime law. Representatives

of two other passengers sued under DPHSA and general maritime law. On appeal, one of these two passengers, Nations, was also found to be a Jones Act seaman, and his widow's claims were remanded to the district court for a determination of damages under the Jones Act. Id., 5 Cir. en banc 1977, 545 F.2d 422, 433. All were awarded damages premised on Mobil's negligence, including an amount for loss of society.

The Supreme Court held that the case was distinguishable from Gaudet because of the place of the death, and refused to allow the award for loss of society to stand. Noting that Congress had specifically limited damages under DOHSA to pecuniary loss, the Court found the goal of uniformity insufficiently compelling to negate clear legislative intent: "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary

supplements." 436 U.S. at 625, 98 S.Ct. at 2015, 56 L.Ed.2d at 587. The Court also commented, "It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute," id. at 624, 98 S.Ct. at 2015, 56 L.Ed.2d at 587; but expressed the belief that the difference between a damage award including loss of society and one without it could be "primarily symbolic" and that the disuniformity created by the opinion may not have "a great practical significance." Id. at 624 n.20, 98 S.Ct. at 2015, 56 L.Ed.2d at 587. Thus in Higginbotham, two claimants, Mrs. Shinn and Mrs. Nation, whose right to recover was based only on the Jones Act because recovery was premised solely upon negligence,[7] were denied

7. We note that the negligence proved was not negligence of a master or crew member. See n.3, supra.

damages for loss of society. While the Jones Act issue was not discussed in the opinion, it was raised squarely by the facts, and urged on application for rehearing.

[2,3] The Jones Act remedy for negligence remains unaffected by either the rules governing damages recoverable for unseaworthiness in general maritime law or by changes in those rules.[8] The Jones Act applies in equal force to the death of seamen on the high seas,[9] in domestic territorial waters,[10] in foreign territorial waters[11] and on land if suffered in the course of employment as a seaman.[12] None can doubt, following Higginbotham, that, if a seaman dies on the high seas, his survivors can recover only pecuniary damages. To adopt the suggestion that, inferentially, the Jones Act has been amended by Gaudet in respect to death on domestic

8. A seaman may, of course, joint a claim for unseaworthiness under general maritime law with his Jones Act claim for negligence. We do not here reach the issue of whether after Higginbotham nonpecuniary damages may be recovered in such an action if unseaworthiness is found. Ivy recovered solely for the negligence of decedent's employer. General maritime law does not provide a cause of action for negligence to a seaman against his employer supplemental to that created by the Jones Act; The Osceola has never been overruled. Therefore, to the extent that Gaudet remains seaworthy after Higginbotham, it can have no impact when, as here, no general maritime law (Moragne-type) claim is involved.

9. E.g., Antypas v. Cia Maritima San Basilo, S.A., 2 Cir. 1976, 541 F.2d 307, cert. denied, 1977, 429 U.S. 1098, 97 S.Ct. 1116, 51 L.Ed.2d 545.

10. E.g., Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 395 n.12, 90 S.Ct. 1772, 1785, 26 L.Ed.2d 339, 354.

11. E.g., Farmer v. Standard Dredging Corp., D.Del.1958, 167 F.Supp. 381.

12. E.g., O'Donnell v. Great Lakes Dredge & Dock Co., 1943, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596; Hopson v. Texaco, Inc., 1966, 383 U.S. 262, 86 S.Ct. 765, 15 L.Ed.2d 740; Vincent v. Harvey Well Serv., 5 Cir. 1971, 441 F.2d 146.

territorial waters would be to approve a different measure of damages under the same federal statute dependent on where death occurred. Neither logic nor the jurisprudence under the gemini Jones Act-F.E.L.A. can sustain such a result. Although many statutes state different rules to apply to different geographical areas and courts have, absent legislation, formulated rules that vary territorially in application, it would be chimerical to convert a single statute into different applications in different geographical areas after it has been applied uniformly throughout our nation and in all the foreign waters to which our ships travel for two-thirds of a century.

[4] For these reasons, we conclude that the Jones Act is a vessel designed for special purposes; it is not certified for Gaudet cargo, and it does not permit the recovery in a wrongful death action

of damages for loss of society of a seaman.[13]

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13. There is superficial appeal in the argument that to award damages for loss of support would be humanitarian, and the correlative implication that to deny it is callous. The same emotive semantics would characterize as parsimonious and unfeeling any denial of any sort of nonpecuniary damage; awards for grief and anguish, for loss of consortium, for loss of affection or for any other sort of emotional distress could be justified by the same appeal that sentiment should disregard history and jurisprudence.

The Jones Act not only implicitly limits the kind of damage that may be recompensed; by incorporating remedies available under the F.E.L.A., it expressly permits only certain persons to receive even redress for pecuniary losses. A dependent, widowed mother may receive nothing for the death of her sole support if her son was married; a dependent, enfeebled aunt, who was actually being supported by her nephew, may recover nothing if her compassionate relative also had a parent, even a wealthy and completely self-supporting one. See 45 U.S.C. § 51. If sheer compassion alone dictates a change in the scope of the Jones Act with respect to items of damage, after more than six decades of consistent interpretation, or with respect to beneficiaries, for whom an even more compelling appeal can be addressed to Congress, as the author of the Jones Act, for it is only under the authority of that statute that the plaintiff has a right to be in court.

The panel opinion, 5 Cir., 585 F.2d 732, is reinstated as to other matters discussed in it. The decision is REVERSED and the case is REMANDED FOR A NEW TRIAL.

JOHN R. BROWN, Chief Judge, with whom KRAVITCH, Circuit Judge, joins, dissenting:

Today a majority of this Court destroys the possibility of recovery in a wrongful death suit for loss of society under the Jones Act for the death of a seaman in territorial waters. In so doing, the Court drains Moragne and Gaudet of their vitality and make much ado of Higginbotham's silence. The end result is a decision contrary to all humanitarian instincts continuously reflected in the admiralty, with the possible exception of The Harrisburg[1] which took 85 years to scuttle.

1. 1886, 119 U.S. 199, 7 S.Ct. 140, L.Ed. 358.

I.

The general maritime law was devoid of a wrongful death remedy for seamen for many years. Courts wrestled with the lack of such a remedy, recognizing the inequity and inhumanity of that void, and developed a clutter of conflicting exceptions to the rule. In an effort to correct the anomalies and confusion engendered by this lack of a wrongful death remedy, the Supreme Court handed down Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 90 S.Ct. 1772, 27 L.Ed.2d 339, 1970 AMC 967, overruling its prior, restrictive and ancient decision in The Harrisburg, 1886, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358. In Moragne the Court considered the claim of a widow of a Sieracki[2] seaman who was killed while working as a longshoreman aboard an ocean-going vessel on navigable waters within the state of Florida. Embracing a modern and

2. Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 AMC 698.

humane approach, the Court permitted the widow her claim, recognizing a new cause of action for recovery under general maritime law.

Four years later, in Sea-Land Services, Inc. v. Gaudet, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, 1973 AMC 2572, the Supreme Court delineated the measure of damages available in a Moragne maritime recovery. In Gaudet, as in Moragne, a widow of a Sieracki seaman killed while working as a longshoreman on Louisiana navigable waters, brought a wrongful death action. The Court held that certain nonpecuniary losses-including loss of society - could be recovered. Again, taking an openhanded approach, the Court recognized the propriety of compensation for certain losses of a nonpecuniary nature.

Together, Moragne and Gaudet present an expansive approach to recovery of non-

pecuniary damages. They recognize the "humane and liberal character of proceedings in admiralty," The Sea Gull, 21 F.Cas. 909 (No. 12,578) (C.C.Md. 1865), quoted in Moragne, supra, 398 U.S. at 387, 90 S.Ct. at 1781, 26 L.Ed.2d at 349, 1970 AMC at 977. And, repeatedly, they underscore the "special solicitude for the welfare of those men who [undertake] to venture upon hazardous and unpredictable sea voyages." Moragne, supra, at 387, 90 S.Ct. at 1780, 26 L.Ed.2d at 349, 1970 AMC at 977. Gaudet, supra, 414 U.S. at 577 and 588, 94 S.Ct. at 811 and 816, 39 L.Ed.2d at 17 and 23, 1973 AMC at 2575 and 2584.

It is this framework that our case must be analyzed. It is true, as the en banc Court points out, that in both Moragne and Gaudet the Supreme Court was primarily concerned with general maritime law and that neither case specifically involved a Jones Act seaman. But it is not true, despite

the insistence of the en banc Court, that Moragne and Gaudet can be pigeonholed wholly apart from the Jones Act.

Rather, the Supreme Court intended to apply Moragne and Gaudet to the Jones Act, encompassing damages for loss of society within the purview of a wrongful death Jones Act recovery. Moragne's creation of a wrongful death remedy was predicated upon a desire to bring the admiralty law in line with modern notions of tort compensation. In particular, the states had enacted wrongful death laws, while the seaman had no redress for wrongful death under general maritime law. In Gaudet, the Court also looked to the modern trend and to the types of losses recoverable under state law in deciding the scope of the Moragne recovery. It is these developments in the law, and their innate rationality, that led the Supreme Court to decide Moragne and Gaudet. These very

same concerns should lead the en banc Court to apply Moragne and Gaudet to the Jones Act.

Until today, this Court has applied Moragne and Gaudet to the Jones Act, permitting the recovery of nonpecuniary damages. In Landry v. Two R. Drilling Co., 5 Cir., 1975, 511 F.2d 138, 1975 AMC 2137, rehearing denied, 517 F.2d 675, 1975 AMC 2135, we recognized the propriety of nonpecuniary Gaudet damages where there is liability under both a general maritime claim for unseaworthiness and a Jones Act claim. And, in Petition of M/V ELAINE JONES, 5 Cir., 513, F.2d 911, 1975 AMC 2098 (on petition for rehearing), cert. denied, 1975, 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60, involving claims of both unseaworthiness and the Jones Act, the Court made no distinction between the two claims. The panel remanded the case to allow an award for loss of society. In

remanding, the panel relied upon Gaudet, indicating that Gaudet very much applies to Jones Act claims.

This is consistent with the broad purposes of the Jones Act. In enacting the Jones Act, Congress intended "to provide liberal recovery for injured workers." Kernan v. American Dredging Co., Inc. 1958, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382, 388, 1958 AMC 251, 256. Seamen are deemed wards of the admiralty and the Jones Act is "liberally construed to carry out its full purpose, which was to enlarge admiralty's protections to its wards." Garrett v. Moore-McCormack Co., Inc., 1942, 317 U.S. 239, 248, 63 S.Ct. 246, 252, 87 L.Ed. 239, 248, 1942 AMC 1645, 1652. Indeed, the Jones Act is not a static remedy, but one to be "developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." Kernan, supra, 355 U.S.

at 432, 78 S.Ct. at 398, 2 L.Ed.2d at 388, 1958 AMC at 256.

In reaching its decision, the en banc Court relies heavily on the 1913 decision in Michigan Central Railroad v. Vreeland, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417, interpreting the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq. (FELA). Such reliance is misplaced. Despite the statutory tie between FELA and the Jones Act, 46 U.S.C.A. § 688, the two are not necessarily nor immutable linked. There was drift away from Vreeland prior to Gaudet, but Gaudet surely marked the end of the anchorage between Jones Act recoveries and Vreeland.

To be sure, FELA case law has often provided a persuasive starting point for analyzing Jones Act claims.[3] But in general, "The admiralty has led, not

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3. Kernan v. American Dredging Co., supra.

followed."[4] The seaman is thought to be subject to greater risks and inconvenience than the railroad worker. Accordingly, the Jones Act has frequently granted relief where the FELA has not. Thus the employer's defense of assumption of risk of the shipowner's negligence was eliminated in Jones Act cases, while the FELA continued to permit this defense.[5] And in Cox v. Roth, 1955, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260, 1955 AMC 942, the Court went beyond the FELA to allow a Jones Act recovery

4. China Union Lines, Ltd. v. A. O. Andersen & Co., 5 Cir., 1966, 364 F.2d 769, 798, 1966 AMC 1653, 1695 (Brown, J., concurring in part and dissenting in part) (different context).

5. The Arizona et al. v. Anelich, 1936, 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075, 1936 AMC 627; Beadle v. Spenser, 1936, 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082, 1936 AMC 635. Robinson concludes that these cases "show that the Supreme Court is not so much transplantin the railroad statute with its railroad setting as it is growing the transplanted act in its new admiralty environment." G. Robinson, Admiralty 314 (West 1939).

against the estate of the deceased employer.[6]

Proceeding specifically to Vreeland, it is true that for many years courts have repeated Vreeland's language that only "pecuniary" damages are permitted. Yet Jones Act recovery has been, nevertheless, subtly but effectively expanded. First, Vreeland's definition of "pecuniary" was read so as to encompass what were at one

6. Other examples of the consistent lead which the Jones Act has taken over FELA include: the extension of a Jones Act remedy to dock workers - in contrast to restrictive FELA interpretation of the definition of railroad workers, Butler v. Whiteman, 1958, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754, 2 L.Ed.2d 754, 1959 AMC 2566; survival of the nonrailroad remedy of maintenance and cure after passage of the Jones Act, Cortes v. Baltimore Insular Line, Inc., 1932, 287 U.S. 367, 53 S.Ct. 173, 77 L.Ed. 368, 1933 AMC 9; and the judicial creation of a Jones Act rescue doctrine, not found in FELA cases. Cortes v. Baltimore Insular Line, Inc., supra (dictum); Gardner v. National Bulk Carriers, Inc., 4 Cir., 1962, 310 F.2d 284, 1963 AMC 29 (en banc), cert. denied, 1963, 372 U.S. 913, 83 S.Ct. 728, 9 L. Ed.2d 721.

time essentially nonpecuniary losses.[7] Second, juries have been permitted to hear evidence which, although tangentially related to "pecuniary" losses, is in fact highly probative of nonpecuniary losses.[8]

After Moragne was decided, admiralty decisions drifted much farther from Vreeland's limitation on damages.[9] Then came

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7. This judicial sleight of hand is well-demonstrated by the fact that admiralty courts began awarding damages for the deaths of minor children. E.g. Complaint of Farrell Lines, Inc., S.D.Ga., 1975, 389 F.Supp. 194, 1976 AMC 1684. As In re Sincere Navigation Corp., E.D. La., 1971, 329 F.Supp. 652, 655 & n.8, 1972 AMC 482, 485 & n.8 (Rubin, J.) points out, these awards could not come about unless the courts were awarding damages for nonpecuniary losses.

8. E.g., Petition of Risdal & Anderson, Inc., 1968, D.Mass., 291 F.Supp. 353, 358, 1968 AMC 2474, 2479. See generally W. Prosser, The Law of Torts, §127, at 907-08 (4th ed. 1971) (jury nullification).

9. Indeed, two leading opinions by then District Judge Rubin come close to repudiating Vreeland's principle (although the cases were not specifically under the Jones Act). In re Sincere Navigation, supra; Dennis v. Central Gulf Steamship Corp., E.D.La., 1971, 323 F. Supp.

Gaudet, which permitted recovery of the nonpecuniary loss of society at issue here. Liability in Gaudet was predicated on unseaworthiness, but, as discussed above, Gaudet necessarily applies to the Jones Act. Not only does the analysis above show that Gaudet controls in Jones Act cases involving loss of society, but a close reading of the majority and dissenting opinions in Gaudet makes clear the departure from Vreeland. See G. Gilmore & C. Black, The Law of Admiralty 371-72 (2d ed. 1975).

First, the Gaudet dissenters state: "Because of its relationship to the FELA . . . , the Jones Act also has been read as forbidding recovery of the sentimental losses approved by the Court today." 414

943, aff'd, 5 Cir., 453 F.2d 137, 1972 AMC 330, cert. denied, 1972, 409 U.S. 948, 93 S.Ct. 286, 34 L.Ed.2d 218. See also In re Farrell Lines, Inc., E.D.La., 1971, 339 F.Supp. 91. But see Petition of M/V ELAINE JONES, 5 Cir., 1973, 480 F.2d 11, 33-34, 1973 AMC 843, 870-71 (modified upon rehearing, after Gaudet was decided, 513 F.2d 911, 1975 AMC 2098); p. _____, slip op.p. 1059.

U.S. at 606, 94 S.Ct. at 825, 39 L.Ed.2d at 33, 1973 AMC at 2597-98 (Powell, J.) (emphasis supplied). In an accompanying footnote, the dissenters cite Vreeland. The dissenters cite Vreeland. The dissenters thus decry the majority's "repudiation" of "(t)he traditional admiralty view . . . that such pecuniary damages are not recoverable under the . . . Jones Act." Id. at 605, 94 S.Ct. at 825, 39 L.Ed.2d at 32, 1973 AMC at 2597. Although one does not always necessarily say what the dissenters say it says, the dissenting Justices were in an excellent position to see exactly what the majority was doing and the consequences to existing decisions.[10]

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10. It is certainly true that the Gaudet dissenters also felt that the majority was repudiating the pecuniary loss limitation expressly contained in the Death on the High Seas Act (DOHSA), and this portion of the dissent was relied upon in Law v. Sea Drilling Corp., 5 Cir., 1975, 523 F.2d 793, 796, 1977 AMC 2394, 2397 (on rehearing) (Law II). Higginbotham demonstrated that this reliance

Second, the opinion of the Court in Gaudet itself indicates that Vreeland's limitations are no longer to be followed. The Gaudet Court explicitly rejects arguments which caused early English Courts to add a pecuniary loss limitation to Lord Campbell's-type Acts. Ibid. at 588-90, 94 S.Ct. at 816-817, 39 L.Ed.2d at 23-24, 1973 AMC at 2584-86. In construing FELA, Vreeland relied upon those early English cases, and the Gaudet Court expressly recognizes that fact. Ibid. at 582 & 586 n.18, 94 S.Ct. at 813 &815 n.18, 39 L.Ed.2d at 19 & 22 n.18, 1973 AMC at 2579 & 2582 n.18. Thus it cannot be denied that Gaudet totally rejects the policies upon which Vreeland was based.

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on the Gaudet dissent was misplaced, since Higginbotham effectively overruled Law II. But because Gaudet involved territorial waters-where DOHSA could not apply but where the Jones Act could-and because both the dissent and majority focused more on the Jones Act and Vreeland than on DOHSA, reliance on the Gaudet dissent is appropriate in this case.

Moreover, Gaudet draws a careful distinction between judge-made limitations on damages and those enacted by state or federal legislatures, arguably presaging Higginbotham. See, e.g., ibid. at 585-88 & n.22, 94 S.Ct. at 814-817 & n.22, 39 L.Ed.2d at 21-23 & n.22, 1973 AMC at 2582-84 & n.22. Gaudet clearly places the Vreeland limitation into the judge-made category, which the Court then proceeds to "shape [in order to] comport with the humanitarian policy of the maritime law . ." Ibid. at 588, 94 S.Ct. at 816, 39 L.Ed.2d at 23, 1973 AMC at 2584.

II.

Unlike the en banc Court, I do not believe the recent but narrow holding in Mobil Oil Corp. v. Higginbotham, 1978, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581, 1978 AMC 1059, is controlling here. The en banc Court makes a mountain of the Supreme Court's molehill of silence. I cannot read so much into so little.

In Higginbotham, the Supreme Court granted Mobil's writ of certiorari on the sole question of:

> Whether the maritime cause of action for deaths occurring within a state's territorial waters created by this Court in Moragne completely replaces the statutory cause of action for death mandated by Congress with respect to deaths occurring within the geographical scope of the Death on the High Seas Act.

Mobil Oil's Writ Application. Clearly, Mobil Oil did not ask the Court to even consider the question of damages under the Jones Act.

Nor did the Court depart from the reason it granted certiorari. The Court based its decision entirely on DOHSA. The entire opinion is cast in terms of an analysis of congressional intent under DOHSA. As the

en banc Court itself points out, the Supreme Court did not even discuss the Jones Act in the case. P._____, slip op.p. 1061.[11]

Nonetheless, even though Higginbotham involved the high seas, even though the opinion was based entirely on DOHSA and even though the Jones Act was nowhere discussed in the Supreme Court opinion, the en banc Court reads in Higginbotham a holding of the law applicable to the Jones Act and applicable in territorial waters. The en banc Court makes this quantum leap by pointing out that "While the Jones Act issue was not discussed in the opinion, it was raised squarely by the facts . . . " P.____, slip op.p. 1061. Specifically, the en banc Court adopts the reasoning of the panel opinion in Ivy, which points

11. See Note, A Post-Higginbotham Analysis-Ivy v. Security Barge Lines, Inc., 4 Maritime Lawyer 149, 152 ("(I)t is noteworthy that nowhere in Higginbotham is there any consideration of the Jones Act status of one of the victims.").

out that Higginbotham did not affirm as to the representatives of Shinn, even though Shinn sued under the Jones Act as well as under DOHSA. Ivy v. Security Barge Lines, Inc., 5 Cir., 1978, 585 F.2d 732, 738. Therefore, the panel reasoned, the Supreme Court must have held explicitly that non-pecuniary damages are not recoverable under the Jones Act.

I think a more reasonable interpretation of Higginbotham is that the Supreme Court passed no judgment on the measure of damages under the Jones Act.[12] It considered solely the DOHSA issue and then reversed and "remanded for further proceedings consistent with this opinion," 436 U.S.

12. See Maraist, Maritime Wrongful Death-Higginbotham Reverses Trend and Creates New Questions, 1979, 39 La.L.Rev. 81, 91-92 ("Nowhere in Higginbotham did the Supreme Court allude to the Jones Act status of Shinn and his beneficiaries . . . . Consequently, the Ivy court may have read too much into the Court's silence in Higginbotham.").

at 626, 98 S.Ct. at 2015, thereby leaving open to the Court of Appeals, or on its direction the District Court, the possibility of Shinn's representatives recovering under the Jones Act.[13] All that the Court held was that as between Moragne and DOHSA, Congress intended that DOHSA should govern in wrongful death recoveries on the high seas. The fact that the Supreme Court does not even discuss the Jones Act provides strong support for this interpretation.

Alternatively, the most the Court in Higginbotham could have been holding is that in a wrongful death action involving a death on the high seas, DOHSA-where applicable- is exclusive and the Jones Act

13. The Jones Act death claim was left initially to the Court of Appeals. On remand this Court simply remanded the case to the District Court for consideration in light of the Supreme Court's mandate. In the District Court the case was thereafter settled with no Court ever undertaking to determine whether, or to what extent, the Jones Act recoveries were subject to an overriding DOHSA restriction.

has to give way to DOHSA.[14]

The result of the Court's reading of Higginbotham is to seriously undermine Gaudet in its application to death on territorial waters. Despite the en banc Court's claim to the contrary, p.____, slip op.p. 1061, the representatives of Shinn recovered not only under DOHSA and the Jones Act, but under the general

14. Even assuming that the Supreme Court in Higginbotham did interpret the Jones Act as it applies to the high seas, there is still no basis for extending this holding to a Jones Act death arising on territorial navigable waters. The en banc Court is no doubt concerned about a lack of uniformity. Yet in language which the en banc Court itself quotes, the Court in Higginbotham makes clear that "the measure of damages in coastal waters will differ from that on the high seas." 436 U.S. at 624, 98 S.Ct. at 2015, 56 L.Ed.2d at 587, 1978 AMC at 1064-65. Thus it is simply not the case that to reach the humanitarian result, it is necessary to "disregard history and jurisprudence." P.____, n.13, slip op. p. 1062, n.13.

maritime law as well.[15] Applying the panel Court's extrapolation approach regarding the Jones Act (an approach that is implicitly affirmed by the en banc Court), the Supreme Court must have held that nonpecuniary damages are not recoverable under general maritime law, otherwise it would have affirmed as to the representatives of Shinn. Applying this approach to a death on territorial waters, a Court would have to hold nonpecuniary damages may not be recovered by the representatives of a Jones Act seaman who died on territorial waters when

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15. As the District Court stated:
> We hold therefore that . . . there be judgment in favor of . . the representatives of Shinn against Movil under the Jones Act, the Death on the High Seas Act and the General Maritime Law.

Higginbotham v. Mobil Oil Corporation, W.D.La., 1973, 357 F.Supp. 1164, 1178. The Court of Appeals decision also recognized that the representatives of Shinn had recovered below under DOHSA, The Jones Act, and general maritime law. 545 F.2d at 424-25, 1977 AMC at 293.

the claim is expressly brought and recovery sustained under the general maritime law.[16] Guadet would thus be consigned to the Briney deep alongside the Harrisburg.

Moragne takes on some leaks too. For against the efforts of Moragne to eliminate the irrational anomalies, Moragne, 398 U.S. at 395-96, 90 S.Ct. 1772, the en banc Court's holding introduces a new one. Under Gaudet, the representatives of a Sieracki seaman, whose rights are derived from the relation of ship and seaman, could recover damages for nonpecuniary losses from an accident in territorial waters under the general maritime law, but the representatives of a Jones Act seaman in the same situation could not.[17]

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16. Indeed, the panel opinion in Ivy explicitly states that Jones Act seaman's survivors are limited to pecuniary damages, even when actions are brought under both the Jones Act and under the general maritime law. 585 F.2d at 738-39 n.8.

17. See Maritime Lawyer Note, supra, note 11, at 153-54 (discussing this and other anomalies).

The en banc Court's reluctance to apply Moragne and Gaudet to the Jones Act is based on a desire for uniform application of the Jones Act, and the result is a uniformity of sorts: the representatives of Jones Act seamen cannot recover nonpecuniary damages regardless of where the death ocurred. But this uniformity directly conflicts with Higginbotham's recognition that the measure of damages in coastal waters will not be the same as that on the high seas.

No solution to the problem will eliminate all disparities in the law. But the purpose of the Jones Act emphasized in Gaudet is "to shape (a) remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction.'[18] I would choose a disparity in

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18. 414 U.S. at 588, 94 S.Ct. at 816, 39 L.Ed.2d at 23, 1973 AMC at 2584.

recovery due to location of the accident over the anomaly of allowing representatives of a Sieracki seaman to recover damages disallowed representatives of a Blue Water Jones Act seaman. In short, I would interpret the Jones Act to provide Gaudet nonpecuniary, as well as pecuniary, damages, at least as to death claims arising on or out of territorial navigable waters.

APPENDIX "B"

WARNIE LEE IVY ET AL., PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

VS.

SECURITY BARGE LINES, INC., DEFENDANT-APPELLANT, CROSS-APPELLEE

Number 76-4130

United States Court of Appeals
Fifth Circuit

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Before COLEMAN, CLARK and RUBIN,

Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

In this case we explore for the first time since the Supreme Court's decision in Mobil Oil Corp. v. Higginbotham, 1978, _____U.S._____, 98 S.Ct. 2010, 56 L.Ed.2d 581, the question whether damages for non-pecuniary losses may be recovered in a

Jones Act suit for the death of a decedent on the territorial waters of the United States. We find ourselves compelled both by the facts of Higginbotham and the policy underlying it to conclude that damages for loss of society may not be allowed. Defendant Security Barge Lines has also raised several other alleged errors. We conclude that the cumulative effect of these irregularities requires us to reverse and remand for a new trial.

I. Facts

John Ivy, the decedent, was a member of the crew of the vessel M/V ISSAQUENA until he was lost and presumably drowned on the night of August 11, 1975 as he was attempting to aid a fellow crewman who had fallen overboard. The vessel and its tow were then heading up the Mississippi River a few miles above Baton Rouge, Louisiana.

Decedent's father, Warnie Lee Ivy, instituted this suit under the Jones Act for negligence and the general maritime law for unseaworthiness. Although plaintiff professed to be the personal representative of decedent, his appointment as administrator of John Ivy's estate was revoked before the case came to trial.

In answer to special interrogatories, the jury found that John Ivy died as a result of the negligence of defendant, but was 50% contributorily negligent himself, and awarded each of his parents $50,000 for loss of support, services, and society. The trial judge refused to instruct the jury to discount any award made to present value. The award was reduced by 50% to reflect the contributory negligence of the decedent, and a judgment was entered. Both parties appealed.[1]

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1. Plaintiff challenges the jury's finding that the decedent was 50% negligent, and that the vessel was

II. Procedural Capacity to Sue

[1] The Jones Act, 46 U.S.C. § 688, provides in part: "[I]n case of the death of any seaman as a result of any [personal injury in the course of his employment] the personal representative of such seaman may maintain an action for damages at law . . ." (emphasis added). The requirement that the cause of action be asserted only by the personal representative of the decedent and not by the beneficiaries of the claim has been extended by analogy to suits brought under general maritime law since Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339. See, e.g., Savoie v. Nolty J. Theriot, Inc., E.D.La. 1972, 396 F.Supp. 973; Futch v. Midland Enterprises, Inc., M.D.La. 1972,

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seaworthy. We find both findings supported by the weight of the evidence, and plaintiff's motion for judgment n. o.v. or for a new trial was therefore properly denied. See Hampton v. Magnolia Towing Co., 5 Cir. 1964, 338 F.2d 303.

344 F.Supp. 324, aff'd 5 Cir. 1973, 471 F.2d 1195. In the few cases in which courts have allowed wrongful death suits to be maintained by the beneficiaries of the decedent rather than his personal representative the result can be explained either by the failure of the defendant to object in a timely fashion as required by Rule 9(a), Federal Rules of Civil Procedure,[2] see, e.g., Landry v. Two R. Drilling Co., 5 Cir. 1975, 511 F.2d 138; Summers v. Interstate Tractor & Equipment Co., 9 Cir. 1972, 466 F.2d 42; Marston v. American Employers Insurance Co., 1 Cir. 1971, 439 F.2d 1035; Young v. Pattridge, N.D.Miss. 1966, 40 F.R.D.

2. Rule 9(a), F.R.C.P. requires:
When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

376, or by the existence of a possible conflict of interest among the beneficiaries requiring multiple representation, see, e.g., Smith v. Clark Sherwood Oil Field Contractors, 5 Cir. 1972, 457 F.2d 1339 cert. denied, 1972, 409 U.S. 980, 93 S.Ct. 308, 34 L.Ed.2d 243; Civil v. Waterman Steamship Corp., 2 Cir. 1954, 217 F.2d 94.

The Supreme Court has likewise interpreted similar language in the Federal Employers' Liability Act, 45 U.S.C. § 51. In American Railroad Co. of Porto Rico v. Birch, 1912, 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879, the widow and son of a deceased railroad worker brought an action as sole beneficiaries, and the lower court held that they should not be compelled to have an administrator appointed for purposes of the suit. The Supreme Court reversed, although a full jury trial had been held:

But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, "in case of his death, . . . to his or her personal representative." . . . [T]his distinction between the parties to be benefited by the suit makes clear the purposes of Congress. To this purpose we must yield. Even if we could say, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the con-

troversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used. (224 U.S. at 557, 32 S.Ct. at 606, 56 L.Ed. at 882).

See also St. Louis, San Francisco & Texas Ry. v. Seale, 1913, 229 U.S. 156, 33 S.Ct. 651, 57 L.Ed. 1129; Troxell v. Delaware, Lackawanna & Western R.R., 1913, 227 U.S. 434, 33 S.Ct. 274, 57 L.Ed. 586; Missouri Kansas & Texas Ry. v. Wulf, 1913, 226 U.S. 570, 33 S.Ct. 135, 57 L.Ed. 355.

The trial judge, therefore, erred in deciding that the plaintiff had procedural capacity to bring this action. Whether Rule 61, Federal Rules of Civil Procedure, modifies the result in American Railroad Co., supra, so that, in the absence of

prejudice to the employer, a new trial would not result from this error alone, we need not determine. See United States ex rel. Harvey Gulf Int'l Marine, Inc. v. Maryland Cas. Co., 5 Cir. 1978, 573 F.2d 245, and opinion of Judge Rubin, concurring in part and dissenting in part.[3] Because we are remanding for a new trial on the basis of the other errors in the original proceedings, the complaint may there be amended so that the claim is asserted by the proper party; if this is not promptly done, the trial court should dismiss the action.[4]

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3. Counsel for Security Barge Lines conceded during oral argument that defendant had in no way been harmed by palintiff's lack of procedural capacity.

4. Plaintiff's counsel claimed below that his client could not secure letters of administration because of his inability to prove that John Ivy is dead. However, Mississippi law explicitly provides for appointment of a guardian in cases like this. Under Miss.Code Ann. § 93-13-161(1):

> Whenever a person, hereinafter

III. Award for Loss of Society

The court refused to eliminate from the damage award the sum allowed as compensation for the parents' loss of society resulting from their son's death. This alleged error requires a detailed analysis of the statutory and judicially-developed damage remedies for maritime deaths, guided by the newly lit Higginbotham beacon.

> referred to as an absentee, who . . . while serving as a merchant seaman, has been officially reported or listed as missing . . . has an interest in any property in this state or is a legal resident of this state and has not appointed an attorney-in-fact with authority to act in his behalf in regard to his property or interest, then the chancery court, or the chancellor in vacation, of the county of such absentee's legal residence, or of the county where the absentee's property is situated, upon petition alleging the foregoing facts and showing the necessity for providing care of the property of such absentee made by any person authorized under law to act as guardian, giving preference to next of kin as now provided by law, and upon good cause being shown, may appoint a guardian to take charge of the absentee's estate.

The Death on the High Seas Act (DOHSA), 46 U.S.C. § 761, provides for recovery by the personal representative of a person whose death resulted from a wrongful act, neglect, or default occurring on the high seas. 46 U.S.C. § 762 specifically limits damages in such a suit to "a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . . "(emphasis added).

The Jones Act has no such specific limitation on damages, but does incorporate by reference the statute governing the death of railway workers, the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. The Liability provision of that statute, 45 U.S.C. § 51, also contains no explicit limitation of damages to pecuniary losses, but was early interpreted thus to confine the award. See, e.g., Michigan Central R.R. v. Vreeland, 1913, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417; American Railroad Co. of Porto

Rico v. Didricksen, 1913, 227 U.S. 145, 33 S.Ct. 224, 57 L.Ed. 456. Because of the incorporation of FELA into the Jones Act, courts have uniformly interpreted Jones Act damage recoveries as similarly limited to pecuniary losses. See, e.g., In re M/V ELAINE JONES, 5 Cir. 1973, 480 F.2d 11, reh. granted, 1973, 513 F.2d 911, cert. denied, 1975, 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60; Cities Service Oil Co. v. Launey, 5 Cir. 1968, 403 F.2d 537; Igneri v. Cie. de Transports Oceaniques, 2 Cir. 1963, 323 F.2d 257, cert. denied, 1964, 376 U.S. 949, 84 S.Ct. 965, 11 L.Ed.2d 969; United States v. Boykin, 5 Cir. 1931, 49 F.2d 762.

The present question about continuing along the course thus charted comes as a result of another line of cases, beginning with Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339. The Supreme Court there recognized for the first time a cause of action for wrongful

death based on general maritime law. Before then death arising from unseaworthiness could be the basis of a suit under DOHSA, which is limited to events occurring outside the territorial waters of the United States; if the accident occurred within territorial waters, the plaintiff was forced to resort to state wrongful death statutes. These statutes were often unwieldy and not designed to accommodate maritime claims; moreover, because they varied from state to state, the representatives of similarly situated deceased seamen might be awarded widely varying sums based on the fortuity of whether the accident occurred within or without the trhee-mile limit and, if it were within that limit, based on the laws of the particular state where the casualty occurred. One of Moragne's objectives was to substitute a uniform rule for these unpredictable eddies. The Court left open the issue of appropriate damages under

this new cause of action, noting "If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful death acts have been implemented with success for decases." 398 U.S. at 408, 90 S.Ct. at 1792, 26 L.Ed.2d at 361.

In the wake of Moragne, some lower courts concluded that the uniformity with which the Supreme Court had been concerned in that case involved uniform bases of liability rather than standard damage recoveries, and held that nonpecuniary damages could be awarded by utilizing state remedies to supplement the new Moragne cause of action. See, e.g., Dennis v. Central Gulf Steamship Corp., 5 Cir. 1972, 453 F.2d 137, cert. denied, 1972, 409 U.S. 948, 93 S.Ct. 286, 34 L.Ed.2d 218; Greene v. Vantage Steamship Corp., 4 Cir. 1972, 466 F.2d 159. Others

concluded that the policy of uniformity embodies in Moragne required that DOHSA's limitations to pecuniary damages be extended to claims under general maritime law. See, e.g., Simpson v. Knutsen, 9 Cir. 1971, 444 F.2d 523; In re U.S. Steel Corp., 6 Cir. 1970, 436 F.2d 1256, cert. denied, 1971, 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153.

The Supreme Court added another beacon to guide lower courts through the unmapped seas in Sea-Land Services, Inc. v. Gaudet, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9. There the decedent had recovered for injuries suffered on state waters, but later died as a result of the same event; his widow sued under Moragne. Although the Court refused to allow double recovery, it did permit the widow to receive compensation for pecuniary damages, including loss of support, and services, as well as funeral expenses. The Court then turned to the nonpecuniary claim for loss of society, and noted that

recovery for this intangible deprivation was available under the majority of state wrongful death statutes, replaced by Moragne. It continued:

> We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act. Tranditionally, however, "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law," . . . The scope and content of the general maritime remedy for wrongful death established in Moragne is no exception. After combing the legislative history of the Death on the High Seas Act, we concluded in Moragne that Congress expressed "no intention . . . of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." . . . Nothing in the

legislative history of the Act suggests that Congress intended the Act's statutory measure of damages to pre-empt any additional elements of damage for a maritime wrongful-death rememdy which this Court might deem "appropriate to effectuate the policies of general maritime law." To the contrary, Congress' insistence that the Act not extend to territorial waters . . . indicates that Congress was not concerned that there be a uniform measure of damages . . . [414 U.S. at 588 n.22, 94 S.Ct. at 816, 39 L.Ed.2d at 23.]

Read boradly, Gaudet would have eliminated the restriction of damages to pecuniary losses, at least so far as a claim for loss of society is concerned, whenever a cause of action could be maintained under general maritime law, whether or not there was also a claim maintainable under DOHSA or the Jones Act. Taking that reading of

the wind, the Fifth Circuit sailed with it following Gaudet. See Law v. Sea Drilling Corp., 5 Cir. 1975, 523 F.2d 793;[5] Landry v. Two R. Drilling Co., 5 Cir. 1975, 511 F.2d 138.[6]

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5. In Law Chief Judge Brown saw the disparity in damage recoveries under the various causes of action as precisely the sort of disuniformity that Moragne was designed to eliminate, and declared, "It is time that the dead hand of The Harrisburg - whether in the courts or on the elbow of the congressional draftsmen of DOHSA - follow the rest of the hulk to an honorable rest in the briny deep . . . No longer does one need . . . DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters - any navigable waters - and it can be enforced in any court." 523 F.2d at 798.

6. Claims were made in Landry both on the basis of general maritime law and under the Jones Act. The defendant had urged that nonpecuniary damages were not recoverable. The court held, however, that a finding of liability would support the award for loss of society, noting, "(W)hile the question of the proper measure of damages when the recovery is solely under the Jones Act has not been decided by this Circuit, where, as here, there is liability under both a Jones Act claim and a general maritime claim for unseaworthiness, this Court has recognized Gaudet damages are proper." 511 F.2d at 143.

The lower court's decision in this case was the first reported after Gaudet that confronted the issue of the propriety of awarding nonpecuniary damages when a recovery is premised solely on the Jones Act. Ivy v. Security Barge Lines, Inc., N.D.Miss. 1976, 424 F.Supp. 1154. The court concluded that Moragne's special solicitude for men challenging the seas, combined with Gaudet's extension of this concern to seamen's dependents, required "that in cases where the only basis of recovery is the negligence of the ship or its owner, such as the case here, dependents of a wrongful-death victim are not limited to a recovery for pecuniary loss, but may recover also for lo-s of services, and society." Id. at 1156.

Since this appeal was filed, however, the Supreme Court has explained that Gaudet is to be read in straitened fashion, and does not negate the statutory limitations on damages in DOHSA, or the judicially

developed restrictions on damages under the Jones Act, at least when the death occurs beyond the territorial limits of United States waters. In Mobil Oil Corp. v. Higginbotham, ____U.S.____, 98 S.Ct. 2010, 56 L.Ed.2d 581, suit was brought by several claimants seeking recovery for the death of their husbands in a helicopter crash outside United States waters. One of the passengers, Shinn, was found by the district court to be a Jones Act seaman and his widow was allowed to sue under the Jones Act, DOHSA, and general mari ime law. Representatives of two other passengers sued under DOHSA and general maritime law.[7] All secured a damage award premised on Mobil's negligence, including an amount for loss of society.

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7. On appeal, one of these two passengers was also found to be a Jones Act seaman, and his widow's claims were remanded to the district court for a determination of damages under the Jones Act. 545 F.2d at 433.

The Supreme Court held that the case was distinguishable from Gaudet because of the place of the death, and refused to allow the award for loss of society to stand. Noting that Congress had specifically limited damages under DOHSA to pecuniary loss, the Court found the goal of uniformity insufficiently compelling to negate clear legislative intent; "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements." 98 S.Ct. at 2015, 56 L.Ed.2d at 587. The Court also noted, "It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute," id., but expressed the belief that the difference between a damage award including loss of society and one without it could be "primarily

symbolic" and that the disuniformity created by the opinion may not have "a great practical significance." 98 S.Ct. at 2015 n.20, 56 L.Ed. at 587.

[2] By deciding that pecuniary damages could not be recovered by any of the plaintiffs, including the representative of Shinn, the Supreme Court decided sub silentio that a Jones Act seaman's beneficiaries can not recover nonpecuniary damages for a death occurring on the high seas. Were nonpecuniary damages available under the Jones Act, although not under DOHSA, the Supreme Court would have affirmed as to Shinn while reversing as to the other plaintiffs. We are bound by its failure to do so.

[3] Our sole remaining task, therefore, is to consider whether this limitation on Jones Act recoveries extends to deaths occurring within the territorial limits of the United States. In failing to differentiate between the Jones Act plaintiff

and those seeking recovery only under DOHSA and general maritime law, the Court has indicated that, as a policy matter, it will not distinguish between the statutorily imposed limitation on damages in DOHSA and the judicially created restriction on damages under the Jones Act. To allow the recovery of nonpecuniary damages under the Jones Act merely because the accident occurred within territorial waters would not only be inconsistent with this policy and negate years of firmly established legal precedent, but would create two separate Jones Act rememdies, each applicable only within its own geographical sphere. It would be anomalous indeed if we interpreted the Supreme Court's opinion to encourage the creation of needless disuniformity based solely on the place of the accident, bringing the law full circle from the days prior to Moragne. We have no authority to change

the course thus set for us, no matter what star we would have chosen to steer by were we plotting the voyage.[8]

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8. We are not unaware of the implications of this result, mandated though it is by Higginbotham. If an explosion occurred aboard a vessel in the Port of New Orleans, caused by both negligence and unseaworthiness, resulting in the death of a passenger, a longshoreman employed by a third party stevedore, and a Jones Act seaman, the recovery by the representative of each would be based on a different standard and be for a different amount: (a) The passenger's representative would have an action under Moragne-Gaudet including damages for loss of services; query: could they join a wrongful death action under Louisiana law, invoking Civil Code Art. 2315 and also recover for survivor's grief? (b) The longshoremen's representative would have a 905(b) action based on land-type negligence standards. 33 U.S.C. § 905(b). See Hess v. Upper Mississippi Towing Corp., 5 Cir. 1977, 559 F.2d 1030, cert. denied, 1978, 435 U.S. 924, 98 S.Ct. 1489, 55 L.Ed.2d 518. The 905(b) claim is exclusive, but the statute does not state the measure of damages. Because the negligence is land-type, would the measure of damages likewise be land-analogized and include grief, as allowed under Civil Code Article 2315? Or does Higginbotham limit their recovery to pecuniary loss? (c) Finally, the Jones Act seaman's survivors receive only reimbursement for pecuniary losses. They, presumably, could not join the state

The award of nonpecuniary damages under the Jones Act here was improper and cannot stand.

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death claim with their Jones Act claim. Lindgren v. United States, 1930, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686; Gillespie v. United States Steel Corp., 1964, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199; Schlichter v. Port Arthur Towing Co., 5 Cir. 1961, 288 F.2d 801, 806, cert. denied, 1961, 368 U.S. 828, 82 S.Ct. 50, 7 L.Ed.2d 32.

If the passenger's representative could cumulate a state death action with the maritime-type action, or the longshoremen's administrator could recover land-measured damages, then we would be back to the situation criticized in Moragne in that the recovery measure would be different if the explosion occurred in Florida waters. See 398 U.S. at 401-02, 90 S.Ct. at 1788, 26 L.Ed.2d at 357.

If the deaths of these persons, each having the same status as one of the three in the first hypothesis, were caused by unseaworthiness and negligence on the high seas, then similar questions would arise and like contradictions might ensue.

IV. Failure to Instruct the Jury to Discount Award to Present Value

Counsel submitted requests for special charges respecting damages. After the trial judge had instructed the jury in substantial accordance with counsel's requests, he afforded counsel, as required by Rule 51, Federal Rules of Civil Procedure, an opportunity to object. Then, for the first time, defendant's lawyer asked for a charge that any sum allowed for loss of future services and support must be discounted. The trial judge expressed willingness to give the instruction to the jury if the attorney would give him the substance of the request. The lawyer asked for a recess to return to his office to prepare such a charge. The judge refused to permit a delay in the trial and declined to prepare the instruction himself - to "shoot from the hip" as he put it - and overruled the objection. This conduct is charged as error.

[4] There can be no doubt that an allowance for future damage must take into account the earning power of the money awarded over the term for which it compensates the plaintiff. Chesapeake & Ohio Ry. Co. v. Kelly, 1916, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117, 1122; In re United States Steel Corp., 6 Cir. 1970, 436 F.2d 1256, 1280; Sleeman v. Chesapeake & Ohio Ry. Co., 6 Cir. 1969, 414 F.2d 305, 307; Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij, 2 Cir. 1971, 443 F.2d 76, 79, aff'd after remand, 1972, 471 F.2d 705, cert. denied, 1973, 411 U.S. 933, 93 S.Ct. 1902, 36 L.Ed.2d 393. It would thus have been incumbent on the lower court to instruct the jury to discount the award to present value had such instruction been timely requested. Ball v. Delta Marine Drilling Co., 5 Cir. 1973, 476 F.2d 287.

Trial judges, however, are not black-robed computers, equipped to spew forth

jury charges on every point of law at the prodding of counsel's magical words. Rule 51 contemplates that requests for special charges shall be submitted in writing "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs . . . " This permits the court to consider the exact charge counsel desires and also gives opposing counsel time to object.

[5] While the trial court does have a duty to honor counsel's requests for special charges timely made, even in instances where only the substance of the issue is made known,[9] there is an obligation on lawyers, too, who know far better than the court the issues in the case and its hidden complexities, to plan ahead, to give

9. See, e.g., Sharp v. Root, 5 Cir. 1957, 240 F.2d 519, 522 & n.3; Dunn v. United States, 5 Cir. 1963, 318 F.2d 89, 93 (requests under Rule 30, F.R. Cr.P.).

the judge at least some opportunity to reflect on requests and tc accord to opposing counsel an opportunity to respond.

[6] In this case is was evident long before the trial began that the plaintiff was requesting substantial damages for future losses. Instead of anticipating the necessity for jury guidance on the question, defense counsel waited until the charge had been completed and the jury was standing by, ready to begin deliveration. Where, as here, a charge was requested orally only after the jury had been instructed, and even then only the subject not the content of the charge was suggested, it was not error for the trial judge to refuse to deliver it. See, e.g., Pinto v. States Marine Corp., 2 Cir. 1961, 296 F.2d 1, 4 n.3, cert. denied, 1962, 369 U.S. 843, 82 S.Ct. 874, 7 L.Ed.2d 847; Wilson v. Southern Farm Bureau Casualty Co., 5 Cir. 1960, 275 F.2d 819, 822, cert. denied, 1960, 364 U.S.

817, 81 S.Ct. 49, 5 L.Ed.2d 48; Turner Construction Co. v. Houlihan, 1 Cir. 1957, 240 F.2d 435, 439-40; Seeraty v. Philadelphia Coca-Cola Bottling Co., 3 Cir. 1952, 198 F.2d 264, 265; Churchfield v. Paul Snyder, Inc., M.D.Pa. 1952, 102 F.Supp. 441, 443-44; Paul v. Duluth Missabe & Iron Range Ry., D.Minn. 1950, 96 F.Supp. 578. See generally Blackmar, Problems of Court and Counsel in Requests and Exceptions: How to Avoid Them, 62 F.R.D. 251 (1974).

Now that the issue has been raised, however, on retrial an appropriate instruction on discounting any damage award for future losses to present value should be given; counsel should prepare a draft of the instruction he suggests in accordance with Rule 51.

V. Insufficiency of Evidence to Support Award for Loss of Services and Support

[7] Defendant also challenges the sufficiency of the evidence to support an award for loss of support and services, and,

in any case, alleges that the award was excessive. While our decision to remand for a new trial obviates the need to rule on the excessiveness of the award, we review the evidence on lost services and support to determine whether it was sufficient to sustain an award in order to provide guidance for the new trial.

The record contains testimony that John Ivy paid certain utility bills, phone bills, and otherwise contributed to household expenses. He also bought gifts for and gave spending money to his younger brother. However, he paid nothing for his room and board. His dervices did not go beyond yard work and occasional babysitting. No documentary evidence was introduced establishing the amount of his financial contributions to the family, nor were his services around the house in any way valued. Under the circumstances, we conclude that the evidence of support and services was

insufficient to show that the Ivys suffered any monetary loss for support and services by their son's death; the net value of his contribution to the household was offset by the room an- board furnished him. The trial judge erred in submitting this issue to the jury. Our conclusion on this issue is, however, without prejudice to the right of the plaintiff to adduce further evidence on remand if such evidence is available to support an award.

VI. Instructions on Negligence

[8] The trial court's instructions on negligence are also assigned as error by defendant. The court instructed the jury:

> In considering whether or not an operation was negligent, it is not necessary that the Plaintiff prove that there was a better or safer method than the method used. All the Plaintiff need to show in order to prove the existence of a negligent operation is to show that

the operation was not reasonably safe under the circumstances.

The court continued sometime later:

Negligence under the Jones Act may consist of a failure to comply with a duty required by law. Employers of seamen have a legal duty to provide their employees with a safe place in which to work.

These instructions demonstrate a certain amount of confusion between the absolute duty imposed upon the owner to maintain a seaworthy vessel and the qualified duty imposed by the negligence standard. The owner of a vessel has an unqualified duty to furnish a vessel and appurtenances reasonably safe and fit for their intended use. See, e.g., Gutierrez v. Waterman Steamship Corp., 1963, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297; Marshall v. Ove Skou Rederi A/S, 5 Cir. 1967, 378 F.2d 193, cert. denied, 1967, 389 U.S. 828, 88

S.Ct. 86, 19 L.Ed.2d 84; Vickers v. Tumey, 5 Cir. 1961, 290 F.2d 426. However, the owner is negligent only if he fails to use reasonable care to maintain a reasonably safe place to work. Cox v. Esso Shipping Co., 5 Cir. 1957, 247 F.2d 629, 637, adopted by the Supreme Court in Michalic v. Cleveland Tankers, Inc., 1960, 364 U.S. 325, 328, 81 S.Ct. 6, 9-10, 5 L.Ed.2d 20, 23-4. See also The M/V "TUNGUS" v. Skovgaard, 1959, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524.

At the conclusion of the new trial on remand, appropriate insructions should of course, be given, with special attention to the distinction between the unseaworthiness and negligence standards.

VII. Improper Closing Argument to Jury

[9] Defendant lastly contends that plaintiff's counsel made an improper closing argument to the jury, including blatant appeals to sympathy. The relevant section of the argument is set out in full in

footnote.[10] We need only note that counsel clearly argued the Golden Rule, that the jurors should put themselves in the shoes

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10. "Now, it is a happy situation that we are not often faced with having to determine or go to court because of the loss of a son. This, fortunately, does not happen very often. And in our system of justice the only way that we have of compensating anyone for a wrong that was done to thiem, and there is just no question of the wrong in this case, the only way we have to compensate them is with money. That is not adequate, but it is the only thing they have, and it is the only thing available. If my son were killed, I don't know, I don't know what the compensation would be. I think probably I would have to go to Mandeville, or some place to the mental institution. But, at any rate, Johnny Ivy was lost and his parents are entitled to recover for his death. Just as you would be entitiled if your sons were wrongfully killed, and I would be entitled if my son were killed. But to put a dollar value on a son's life, you know - . . . What is grief worth? Grief. What is the permanent lack of a smile? . . . This loss has got to be adequately compensated. And I can only suggest to you that when you determine the amount of damages to be awarded to Mr. and Mrs. Ivy that you place yourselves in their position, that you put yourself in their shoes. And I can only suggest to you that an award of less than $100,00 per parent would not be adequate. There is just no way to adequately compensate them, but that is the best way we have."

of the plaintiff and do unto his as they would have him do unto them under similar circumstances. Such an argument is universally recognized as improper[11] because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on

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11. See, e.g., Chicago & N.W. Ry. v. Kelly, 8 Cir. 1936, 84 F.2d 569, 576; F.W. Woolworth Co. v. Wilson, 5 Cir. 1934, 74 F.2d 439, 442-43; Klein v. Herring, Fla.Dist.Ct.App. 1977, 347 So.2d 681, 682; Delaware Olds, Inc. v. Dixon, Del. 1976, 367 A.2d 178, 179; Colgan v. Raymond, 1966, 275 Minn. 219, 146 N.W.2d 530, 535; Miku v. Olmen, Fla. Dist.Ct.App. 1966, 193 So.2d 232; Copiah Dairies, Inc. v. Addkison, 1963, 247 Miss. 327, 153 So.2d 689, 694; Roth v. Jelden, 1962, 80 S.D. 40, 118 N.W.2d 20, 25; Phillips v. Fulghum, 1962, 203 Va. 543, 125 S.E.2d 835, 839; Brant v. Wabash R.R., 1961, 31 I11.App.2d 337, 176 N.E.2d 13, 14, rev'd on other grounds, 1962, 24 I11.2d 541, 182 N.E.2d 181; Jackson v. Southwestern Pub. Serv.Co., 1960, 66 N.M. 458, 349 P.2d 1029, 1040; Faught v. Washam, Mo. 1959, 329 S.W.2d 588, 602; Red Top Cab Co. v. Capps, Tex.Civ.App. 1954, 270 S.W.2d 273, 275 n.2.

the evidence. Counsel's remarks at the conclusion of the new trial on remand must be confined to appropriate argument.

REVERSED AND REMANDED FOR A NEW TRIAL.

APPENDIX "C"

Warnie Lee IVY, etc., Plaintiff,

v.

SECURITY BARGE LINES, INC.,
Defendant.

No. GC 75-137-S.

United States District Court
N. D. Mississippi,
Greenville Division.

Sept. 22, 1976.

MEMORANDUM OF DECISION

ORMA R. SMITH, District Judge.

The jury in response to interrogatories submitted to it by the court found that the Issaquena, its gear, crew or appurtenances, were not unseaworthy; that defendant was negligent and such negligence played a part in bringing about or causing the death of the unmarried seaman John Edward Ivy.

In fixing damages for the parents of John Edward Ivy the jury found that the father suffered damages of $20,000 for loss

of support, $10,000 for loss of services and $20,000 for loss of society. The mother's damages were fixed in similar amounts.

The jury also found that the seaman was guilty of negligence which proximately contributed to his death and fixed the percentage at 50 percent.

At the conclusion of the trial the court requested memoranda from counsel as to the proper amount of the judgment to be entered on the verdict of the jury. The memoranda have been received and carefully considered.

Defendant takes the position that the only award which can be made by virtue of the verdict is that portion of the award for damages wwich represents actual pecuniary loss to plaintiffs, occasioned by the seaman's death, citing as authority for the position, Petition of Canal Barge Co., 323 F.Supp. 805, 820 (N.D.Miss.1971) wherein Chief Judge Keady said "[t]he personal representative may recover for the actual

pecuniary loss occasioned by the seaman's death. This is the measure of damages under F.E.L.A. 45 U.S.C. § 51 . . . " This holding was affirmed on appeal. Petition of M/V ELAINE JONES, 480 F.2d 11, 32 (5th Cir. 1973). Defendant also cites a long line of cases which hold that in a death action brought under the Jones Act recovery is restricted to pecuniary losses only.

The Fifth Circuit, however, on petition for rehearing, remanded Canal Barge to the District Court for reexamination of its findings of general damages in light of the Gaudet decision;[1] Petition of M/V ELAINE JONES, 513 F.2d 911, 913 (5th Cir. 1975).

> In Gaudet the Supreme Court said:
>
> Our review of those authorities, and the policies of maritime law, persuade us that, under the maritime wrongful-death remedy, the decedent's dependents

1. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

> may recover damages for their loss of support, services, and society, as well as funeral expenses.

414 U.S. at 584, 94 S.Ct. at 814, 39 L.Ed.2d at 20-21.

[1] The Court cannot find a case where the Fifth Circuit has considered the question of the proper measure of damages when the recovery is solely under the Jones Act. The issue, however, is settled, at least in this circuit, where liability is fixed under both a Jones Act claim and a general maritime claim for unseaworthiness. In such instances Gaudet damages are proper. Landry v. Two R. Drilling Co., 511 F.2d 138, 143 (5th Cir. 1975).

The Supreme Court in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) held that an action lies under general maritime law for death caused by violation of maritime duties but left the shaping of the new non-statutory

action to future cases.

The question was considered by the Supreme Court in Gaudet, a case which involved an action brought by a widow of a longshoreman for the wrongful death of her husband-alleged to have resulted from injuries suffered by him while aboard a vessel in navigable waters-after the decedent recovered damages in his lifetime for his injuries. The Supreme Court affirmed the holding of the Fifth Circuit that Moragne gave "Mrs. Gaudet . . . a compensable cause of action for Mr. Gaudet's death wholly apart from and not extinguished by the latter's recovery for his personal injuries . . . " Sea-Land Services v. Gaudet, 414 U.S. 573, 574-75, 94 S.Ct. 806, 810, 39 L.Ed.2d 9, 15 (1974), quoting, Gaudet v. Sea-Land Services, Inc., 463 F.2d 1331, 1332 (5th Cir. 1972). The Court went on to observe, as noted above, that under the maritime wrongful-death remedy the dependents of a decedent

may recover for loss of support, services and society, as well as funeral expenses.

[2] The appellate courts when considering the uniform federal cause of action for maritime death created in Moragne, reason that the action is "designed to extend to the dependents of maritime wrongful-death victims admiralty's 'special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages.'" Sea-Land Services v. Gaudet, 414 U.S. at 577, 94 S.Ct. at 811, 39 L.Ed.2d at 17, quoting, Moragne v. States Marine Lines, 398 U.S. 375, 387, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). Such reasoning convinces the court that in cases where the only basis of recovery is the negligence of the ship or its owner, such as the case here, dependents of a wrongful-death victim are not limited to a recovery for pecuniary loss, but may recover also for loss of services, and society. See Law v. Sea Drilling Corp.,

523 F.2d 793 (5th Cir. 1975).

The Court concludes that judgment should be entered in favor of each parent against defendant for the sum of $25,000. (The aggregate award decreased by the seaman's negligent contribution to his death.)

[3] Defendant has made the contention that, in any event, the jury awards must be discounted to present values, using a discount rate of not less than 4 percent, the rate used by Judge Keady in Canal Barge. The cases are not similar. Judge Keady tried the Canal Barge case without a jury and in the case at bar, the awards were fixed by the jury on the evidence and instructions of the court. It is elementary that a jury award "need not conform to strict arithmetical calculations." McDonald v. Federal Barge Lines, Inc., 496 F.2d 1376, 1378 (5th Cir. 1974). The court in McDonald said:

> The jury, as finders of fact, have the exclusive obligation to compute

damages and that computation need not conform to strict arithmetical calculations but may be in the form of a lump sum award. [Citations omitted] We review the jury verdict, whether it be lump sum or itemized, to find if there is sufficient evidence to support the award.

496 F.2d at 1378

In the opinion of the court, there was sufficient evidence in the action sub judice to support the several awards made by the jury.

The clerk will enter final judgment in accordance with the provisions of this decision.

APPENDIX "D"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF MISSISSIPPI

GREENVILLE DIVISION

WARNIE LEE IVY, ETC

VERSUS NO. GC 75-137-S

SECURITY BARGE LINES, INC.

SPECIAL VERDICT WITH INTERROGATORIES

We, the jury, having been duly empaneled and sworn to try the issues, find our special verdict as follows:

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence in the case that John Edward Ivy lost his life on the occasion in question:

ANSWER: Yes

If your answer to this Interrogatory No. 1 is "No", do not answer any of the interrogatories which follow, and have the foreperson to sign and date the verdict form and return it to the Court as the verdict of the jury.

If your answer is "Yes", then proceed to answer the interrogatories which follow as may be directed.

INTERROGATORY NO. 2

Do you find from a preponderance of the evidence in the case that the M/V ISSAQUENA, its gear, crew, or appurtenances were unseaworthy at any time John Edward Ivy was employed by the vessel?

ANSWER No

INTERROGATORY NO. 3

If your answer to Number Two (2) above is "yes", do you find from a preponderance of the evidence in the case that the unseaworthy condition caused or contributed to John Edward Ivy's death?

ANSWER_____

INTERROGATORY NO. 4

Do you find from a preponderance of the evidence that the defendant, Security Barge Lines, Inc., or anyone for whose conduct defendant was legally responsible, was negligent?

ANSWER Yes

INTERROGATORY NO. 5

If your answer to Interrogatory No. 4 above is "yes", do you find from a preponderance of the evidence that such negligence played any part, no matter how small, in bringing about or causing John Edward Ivy's death?

ANSWER Yes

If your answer to Interrogatory No. 5 and Interrogatory No. 3 above is "No", you shall not answer any of the interrogatories which follow. In such an event the foreperson should sign and date the verdict form and return it to the Court as the

verdict of the jury.

If your answer to Interrogatory No. 5 or Interrogatory No. 3 above is "Yes", continue with the interrogatories which follow, as directed.

INTERROGATORY NO. 6

Do you find from a preponderance of the evidence in the case that John Edward Ivy was negligent?

ANSWER Yes

If your answer to Interrogatory No. 6 is "Yes", answer the following Interrogatory No. 7; otherwise, do not do so.

INTERROGATORY NO. 7

Do you find from a preponderance of the evidence in the case that the negligence of John Edward Ivy proximately caused or contributed to his death.

ANSWER Yes

If your answer to this Interrogatory No. 7 is "Yes", then answer the Interrogatory No. 8 which follows; otherwise, do not do so.

INTERROGATORY NO. 8

To what extent, stated in terms of percentage, do you find from a preponderance of the evidence in the case that John Edward Ivy's negligence contributed to his own death?

ANSWER 50%

INTERROGATORY NO. 9

What amount do you find, from a preponderance of the evidence in the case, without any reduction for any negligence which you may find on the part of John Edward Ivy, will fairly and adequately compensate Warnie Lee Ivy and Jewel Dean Ivy? Answer separately for each.

A. Warnie Lee Ivy
   (1) loss of support $20,000
   (2) loss of services $10,000
   (3) loss of society $20,000

B. Jewel Dean Ivy
   (1) loss of support $20,000
   (2) loss of services $10,000

(3) loss of society $20,000

7/21/76 (Date)

s/Mrs. Linda Dunn
Foreperson

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

GREENVILLE DIVISION

WARNIE LEE IVY and
JEWEL DEAN IVY,
Plaintiffs

VS No. GC 75-137-S

SECURITY BARGE LINES, INC.,
Defendant

FINAL JUDGMENT

This action came on for trial before the Court and a jury, Honorable Orma R. Smith, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

That the plaintiff, Warnie Lee Ivy, father of the deceased, John Edward Ivy, recover of the defendant, Security Barge Lines, Inc., the sum of $25,000, with

interest thereon from this date until paid at the rate of 8 per cent as provided by law and his cost of the action.

That the plaintiff, Jewel Dean Ivy, mother of the deceased, John Edward Ivy, recover of the defendant, Security Barge Lines, Inc., the sum of $25,000, with interest thereon from this date until paid at the rate of 8 per cent as provided by law and her cost of the action.

Dated at Greenville, Mississippi, this the 23rd day of September, 1976.

NORMAN L. GILLESPIE, Clerk

By: s/Margaret K. Tubbs

Margaret K. Tubbs,
Deputy Clerk